Supreme Court, U.S.
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No. 03-653 OCT 29 2003

In The

Supreme Court of the United States

EXTRUSIONS DIVISION, INC.,

Petitioner,

v.

SILVER CREEK DRAIN DISTRICT,

Respondent.

On Petition For A Writ Of Certiorari To The Michigan Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the "just compensation" clause of the Fifth Amendment of the United States Constitution require that all factors relevant to market value always be considered in the just compensation determination?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The only parties to this proceeding are Petitioner and Respondent. Pursuant to Supreme Court Rule 29.6, Petitioner states that it has no parent corporation and that no publicly held company owns 10% or more of Petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Extrusions Division, Inc. ("Extrusions") respectfully petitions this Court to review the judgment of the Michigan Supreme Court.

OPINIONS BELOW

The opinion of the Michigan Supreme Court (App., 1a-21a) is reported at 468 Mich. 367, 663 N.W.2d 436 (2003). The opinion of the Michigan Court of Appeals (App., 22a-37a) is reported at 245 Mich. App. 556, 630 N.W.2d 347 (2001). The Findings of Fact and Conclusions of Law of the trial court and its final Order are unreported. (App., 38a-49a).

JURISDICTION

The Michigan Supreme Court's judgment was entered on June 17, 2003. A timely motion for rehearing was denied on July 31, 2003. ___ Mich. ___, 668 N.W.2d 145 (2003) (App., 50a). This Court has jurisdiction under 28 U.S.C. § 1257(1). 28 U.S.C. § 2403(b) may apply, and therefore the notification required by S. Ct. Rule 29.4(c) has been given to Michael Cox, Attorney General for the State of Michigan.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the U.S. Constitution provides in relevant part: "This Constitution . . . shall be the supreme Law of the Land and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

The Fifth Amendment to the U.S. Constitution provides in relevant part: ". . . nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The relevant provisions of the Michigan Uniform Condemnation Procedures Act are the 1993 Amendments to Sections 5, 6a, 7, 8 and 9 of that Act and are reproduced at App., 51a-60a. Mich. Comp. Laws §§ 213.55, 213.56a, 213.57, 213.58 and 213.59.

INTRODUCTION

This case involves a substantial conflict between the Supreme Courts of Connecticut, Iowa, Michigan, and New Jersey on an important and difficult issue of federal constitutional law – the method of calculating a property owner's right to "just compensation" when the condemned property is environmentally contaminated. This is a widespread and recurring question as local governments across the country, aided by federal and state money, continue to condemn contaminated "brownfields" for urban redevelopment. The decision below strips property owners of the Fifth Amendment's protections and excuses local governments from their constitutional obligation to pay just compensation. The conflict and national uncertainty in takings jurisprudence warrant resolution by this Court.

The Michigan and California Legislatures and the Supreme Courts of Iowa and New Jersey have adopted a method of just compensation that values contaminated property "as clean" (i.e., uncontaminated). This method

requires that the condemning agency recover its remediation costs not in a just compensation trial, but in a post-condemnation environmental cost-recovery action against all parties responsible for the contamination. Often, this method places all or a portion of the estimated just compensation in escrow pending the outcome of the cost-recovery action.

This method is called the "trust," "escrow," or (where there is no trust aspect) "exclusion" approach to valuation, and it is the method that best indemnifies the owner as the Fifth Amendment requires.[1] To begin, valuing environmentally contaminated property presents intractable appraisal problems, and the extent of the contamination is usually not known until the cleanup is completed. More importantly, the current owner may not be the party responsible for the contamination or cleanup costs. The exclusion approach ensures that the property is accurately valued and that contamination costs are assessed only against responsible parties and not against otherwise innocent owners (which is what happened in the present case). It also ensures that the condemning agency does not "double-dip" by first paying a discount for the property and then receiving federal or state funds for the cleanup, or later recovering reimbursement in a cost-recovery action from potentially responsible parties.

In the present case, the Michigan Supreme Court held that the exclusion method violates the Fifth Amendment because it excludes "a factor relevant to market value." The Michigan Supreme Court equates "just compensation" with "market value," and because contamination is relevant to market value, according to the Michigan Supreme Court, it cannot be excluded from the "just compensation"

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[1] For the remainder of this brief, this method will be called the exclusion method because it is the exclusion aspect, and not the trust aspect, of this method that is before this Court.

analysis. In so holding, the Michigan Supreme Court reversed the holding of the Michigan Court of Appeals and aligned itself with the Supreme Court of Connecticut, which has similarly held the exclusion method unconstitutional. The Michigan Court of Appeals, on the other hand, had aligned itself with the Supreme Courts of Iowa and New Jersey and upheld the exclusion method as the approach that best indemnifies the owner as the Fifth Amendment requires.

The Michigan Supreme Court's holding was in error, and it conflicts with and misinterprets this Court's precedents. This Court has consistently held that the Fifth Amendment is intended to fully indemnify the property owner, and therefore the appropriate method of compensation is the one that puts the owner in the position he would have been but for the taking. Sometimes that method is "market value"; sometimes it is a different method. The exclusion method does nothing to upset this constitutionally mandated standard, it advances it. After the just compensation and cost-recovery trials are completed, the owner receives full value for the property "as clean" less the cleanup costs assessed against the owner under applicable environmental laws. This puts the owner in the position it would have been but for the taking.

This case, then, presents an important and unsettled issue of national importance. Environmentally contaminated property will continue to be taken for public purposes as more urban "brownfields" are converted to productive uses by local governments, yet the constitutionality of the popular exclusion valuation method is unsettled among the state supreme courts that have considered it. This Court should grant certiorari to resolve the deepening conflict between state supreme courts and to ensure national uniformity in takings jurisprudence.

STATEMENT OF THE CASE

A. Michigan's Statutory Approach Excludes Evidence of Contamination from the "Just Compensation" Trial and Requires the Condemning Agency to Pursue a Separate Environmental Cost-Recovery Action Against the Parties Responsible for the Contamination.

In 1993, the Michigan Legislature passed a package of "brownfield redevelopment" bills aimed at sparking urban redevelopment through the reclamation of contaminated urban properties. One of these bills amended the Michigan Uniform Condemnation Procedures Act (the "UCPA") to separate the "just compensation" determination from the environmental contamination determination. MCL §§ 213.55, 213.56a, 213.57, 213.58, and 213.59 (App., 51a-60a); House Legislative Analysis Section, HB 4719 (Mich. June 16, 1993) (App., 63a-65a). These amendments allowed the condemning agency, if it thought the property was contaminated, to reserve its right to bring a separate cost-recovery action against the owner and any other responsible parties, and to put the "good faith" offer into escrow until after the environmental contamination issue had been resolved. The property is then valued "as clean." If the condemning agency did not think the property was contaminated or the owner responsible for the contamination, it could waive its right to escrow the funds and its right to bring a separate cost-recovery claim. In addition, in certain instances, the property owner could bring a motion in the trial court to force the condemning agency to waive these rights.

Nichols on Eminent Domain, the leading treatise in the area of condemnation law, recommends this trust or escrow approach and describes it as follows:

> The trust/escrow approach is a variation of the exclusionary approach. . . . Under the trust/escrow approach, evidence of contamination is excluded from the eminent domain valuation

> trial, which is directed toward determining the full value of the property if it were uncontaminated. Once value is determined, the full award [of] just compensation is not paid directly to the owner. Rather, under this approach a portion of the award sufficient to cover cleanup costs is escrowed or held in trust until the exact amount of cleanup costs has been determined. Once response costs are determined, a corresponding amount representing the owner's liability is then disbursed from the trust or escrow account. Only the surplus, if any, is paid to the owner.
>
> The trust/escrow approach has gained widespread recognition. . . .
>
> . . . [T]he trust/escrow approach has persuasive strengths as outlined herein and may be an appealing practical compromise for those courts that are disinclined to or are barred from excluding evidence of contamination in the valuation trial.

7A *Nichols on Eminent Domain* § 13B.03(4) (2003).

The purpose of the exclusionary method is to balance the competing risks and liabilities of the parties to a condemnation action by (i) mirroring how parties buy and sell contaminated property in the marketplace, (ii) ensuring that property valuations are not sheer guesswork, given that contaminated property presents intractable appraisal problems, (iii) protecting the current owner's constitutional due process rights by requiring that cleanup costs be assessed against the owner only to the extent that the owner is actually liable under the environmental statutes for such cleanup costs, and (iv) protecting the public fisc, because the condemning agency no longer needs to make estimates based on imperfect pre-condemnation investigations as to the cost of cleaning up the property. *Id.* at (2) and (4); House Legislative Analysis, HB 4719 (Mich. June 16, 1993) (App. 63a-65a).

California has adopted this method for condemnation actions brought by school districts, and the Supreme Courts of Iowa and New Jersey have judicially adopted this approach. Cal. Civ. Pro. Code § 1263.740 (2002) ("The presence of any hazardous material within a property shall not be considered in appraising the property. . . ."); *Housing Auth. of the City of New Brunswick v. Suydam Investors, LLC,* 826 A.2d 673 (N.J. 2003); *Alladin, Inc. v. Black Hawk County, Iowa*, 562 N.W.2d 608 (Iowa 1997).

B. Despite Michigan's Exclusion Statute, the Trial Court Values the Property as Contaminated After the Condemning Agency Realizes that It Cannot Hold the Property Owner Liable Under the Environmental Laws.

The property at issue in this case is "Old South Field," an abandoned 8-acre high school football field where former President Gerald R. Ford once played football for Grand Rapids South High. The field was zoned for light industrial use. Extrusions bought the field in 1982 for $106,000 to use for future expansion of its adjacent manufacturing facility, and all it did with the field during its 12 years of ownership was to place a chain link fence around the perimeter. The parties agreed that Extrusions was not responsible for any of the contamination existing on the field. *Findings of Fact and Conclusions of Law,* Nov. 6, 1997, *Stipulated Facts* ¶¶ 1-4 and 7, *Findings of Fact* ¶ 1 (App., 38a-49a).

After identifying the still-vacant field as a potential location for excavating a large storm water retention basin, Respondent Kent County Drain District (the "District") offered to purchase the field from Extrusions for $211,300 in 1994. Well before making the offer, the District had conducted environmental testing of the field and discovered groundwater contamination (which is present throughout this industrial district but is largely irrelevant to value because the entire area is connected to municipal sewer and water service) and mild contamination in the

topsoil, principally arsenic (probably from the herbicides used on the football field). So, in making its offer, the District reserved the option to bring an environmental cost-recovery action against Extrusions later, as it was required to do under Michigan's exclusion statute if it wanted a setoff for the contamination. For that reason, the $211,300 represented the District's estimate of the field's value "as clean."

Extrusions rejected the $211,300 "as clean" offer as too low. Indeed, the Grand Rapids assessor had, a year earlier in 1993, valued the field at $264,600 *as contaminated*. *Findings of Fact* ¶ 4 (App., 38a-46a); *Trial Testimony of Jerrold A. Shupe,* Sep. 22, 1997, at 26 (App., 61a-62a). The District then filed a condemnation complaint against Extrusions. The District availed itself of the exclusion provisions of the UCPA, valued the field "as clean" at $211,300, reserved the right to later sue Extrusions for environmental cleanup costs, and asked the trial court to place the entire amount of the offer in escrow as security for anticipated cleanup costs, which the trial court did.

However, while the District's condemnation complaint was pending in the trial court, the Michigan Legislature revised the liability presumptions in Michigan's environmental statutes to raise the burden of proof in environmental cleanup actions. Now, the party seeking recovery of cleanup costs has to prove that the landowner actually was responsible for, or had contributed to, the contamination found on the property, and not merely that the landowner was in the chain of title.[2] *Compare* Mich. Comp.

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[2] Even before these amendments, under the applicable federal and Michigan statutes in effect prior to June 5, 1995, Extrusions would have had available to it the "innocent landowner" defense, a defense that the parties stipulated Extrusions would have met. 42 U.S.C. § 9601(35)(A) (1988); 42 U.S.C. § 9607(b) (1986); Mich. Comp. Laws

(Continued on following page)

Laws § 299.612a (repealed effective June 5, 1995) *with* Mich. Comp. Laws § 324.20126(1)(a). In addition, the Michigan Legislature abandoned the "one size fits all" cleanup standard and established separate "residential," "commercial" and "industrial" standards for contamination under which the arsenic in the topsoil of the field would now have been acceptable if the property was used for industrial or manufacturing purposes (which was the highest and best use of the field).

Realizing that it no longer had any reasonable prospect of recovering money from Extrusions in an environmental cost-recovery action under the new law, the District waived its right to a cost-recovery action and allowed the escrowed money to be released to Extrusions. Under Michigan's exclusion statute this should have ended the matter. But the District, unable or unwilling to sue the parties actually responsible for the contamination (including the Grand Rapids Public Schools), sought to introduce evidence of the contamination at the condemnation trial. Over Extrusions' objections, the trial court allowed the contamination evidence, holding "What it is basically is a factor that impacts value. . . . it seems to me the issue can be submitted on the question of valuation and for that purpose only." *Hearing on Motion In Limine to Exclude Testimony or Evidence*, June 13, 1997, at 24-25.

At trial, the District's appraiser valued the property "as clean", indicating that he didn't have the experience or the information necessary to appraise the property "as contaminated." The District's environmental consultant (who had no expertise in appraising property) then testified as to the *estimated* cost of the *estimated* cleanup the State of Michigan would have required to grant a "closure letter" under the old environmental laws. Because the

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§ 299.612a (repealed effective June 5, 1995); *Findings of Fact and Conclusions of Law, Stipulated Facts* ¶¶ 3-4 (App., 38a-46a).

District excavated the field for purposes of a storm water retention basin, these estimates of the cost of cleaning up the field for industrial purposes were just that – estimates. They bore no relation to the work the District actually did on the field. The District moved thousands of yards of dirt to build its retention basin. In addition, almost certainly all or substantially all of the environmental costs the District incurred were reimbursed by the federal or state governments.

Left to fight fire with fire, Extrusions presented evidence from an appraiser that the value of the field "as clean" was significantly higher than the District said it was. Extrusions then presented evidence from an environmental engineer that the remediation necessary to get a "closure letter" from the State of Michigan under the old environmental laws for this type of industrial property would not cost nearly as much as the District said it would, because most of the field would be paved over anyway if it were developed for industrial purposes.

The trial court averaged the "as clean" values presented by the parties and deducted from that number the average of the estimated cost to remediate the field and obtain a "closure letter" from the State. The trial court determined that the resulting amount of $41,032 was "just compensation" for the field, despite the lack of any evidence that this was in the range of the fair market value of the field "as contaminated." *Findings of Fact* ¶ 6 and *Conclusions of Law* ¶¶ 9 and 10 (App., 38a-46a). As noted above, the fair market value of the field as determined by the assessor in 1993 was $264,600 *as contaminated. Findings of Fact* ¶¶ 2, 3 and 4 and *Conclusions of Law* ¶ 10 (App., 38a-46a); *Trial Testimony of Jerrold A. Shupe,* Sep. 22, 1997, at 26 (App., 61a-62a).

C. The Michigan Court of Appeals Reverses the Trial Court Because the Plain Language of the Statute Requires that Contamination Be Excluded From the "Just Compensation" Trial and Addressed in a Separate Cost-Recovery Action; the Court of Appeals Reasons that This Method Best Guarantees the Constitutional Rights of Just Compensation and Due Process.

The Michigan Court of Appeals reversed the trial court and held that the "plain language" of Michigan's exclusion statute mandates that environmental contamination cleanup costs can only be recovered through a separate cost recovery action. Evidence of such contamination must therefore be excluded from the just compensation portion of the condemnation trial. The Court of Appeals also reasoned that, given the inherently speculative nature of appraising the market value of contaminated properties, the Michigan Legislature's separation of the issue of environmental contamination from the just compensation analysis best served a property owner's constitutional rights of due process and just compensation.

Specifically, the Court of Appeals first held that the plain language of the statute, apart from any constitutional considerations, required that contamination be excluded from the just compensation trial. In so holding, the Court of Appeals began its analysis by noting that the original version of the UCPA, enacted in 1980, was silent as to the prospect of environmental contamination and its effect on the condemnation process, but that soon thereafter courts were flooded with environmental contamination lawsuits. According to the court, the 1993 amendments were adopted against this backdrop "to incorporate procedures addressing the potential of liability arising from cleanup costs of property subject to acquisition through the exercise of eminent domain." (App., 29a). The Court of Appeals then examined the "plain language" of the statute and the statute's purposes and held:

> This language supports the conclusion that any form of cost recovery arising from environmental contamination is to be pursued in a separate cause of action. There would be no purpose to these amendments if a court, in the process of determining just compensation, could simply deduct remediation costs from the fair market value of the property.

(App., 30a-31a).

The Court of Appeals buttressed this "plain language" conclusion by further holding that separating the issues of environmental contamination from the just compensation determination was consistent with the constitutional mandate that the landowner be placed in as good a condition as it would have been had the taking not occurred. (App., 27a-28a, 32a). Allowing environmental issues into the just compensation phase would defeat this mandate in two ways. First, it would rob the owner of due process rights the owner would have in an environmental cost-recovery action:

> By deducting estimated cleanup costs from a parcel's value in determining just compensation for a taking, a court circumvents any defense a landowner might have to liability for such costs. As in this case where the parties stipulated that the environmental contamination was present on Old South Field when Extrusions purchased the land, *the inequity of deducting such costs before any determination of the landowner's liability is clear*. . . . The inequity is especially evident in this case where the drain district admits it chose not to incur the cost of attempting to prove Extrusions' liability for the contamination and unequivocally stated it did not intend to bring a cost recovery action against Extrusions.

(App., 31a) (emphasis added; internal citations omitted).

Second, "[p]recluding the consideration of remediation costs when determining just compensation is also consistent with the traditional notion that the landowner should be placed in as good a condition as it would have been had the taking not occurred." (App., 32a). Allowing evidence of environmental contamination would introduce undue speculation into the just compensation determination because "[c]ontaminated properties are like snow flakes; no two are alike. Thus, it is virtually impossible to find a comparable parcel of property on which to base an estimation of value." (App., 33a). The Michigan Court of Appeals also found that the particular method employed by the trial court in this case – simply deducting the estimated remediation costs from the market value of the property "as clean" – was clearly inappropriate and not in accord with accepted appraisal practice. (App., 34a).

The Court of Appeals' reversal of the trial court, then, relied principally on the "plain language" of the statute, but also on constitutional principles of just compensation and due process.

D. The Michigan Supreme Court Reverses the Court of Appeals and Affirms the Trial Court on the Grounds that Environmental Contamination is Relevant to "Market Value" and Therefore Cannot, as a Matter of Constitutional Law, be Excluded from the "Just Compensation" Analysis.

Where the Michigan Court of Appeals relied primarily on statutory interpretation and secondarily on constitutional grounds in reversing the trial court, the Michigan Supreme Court relied solely (and erroneously) on constitutional grounds in reinstating the judgment of the trial court.

In reaching its holding, the Michigan Supreme Court reasoned that it did not even need to engage in the exercise of statutory interpretation. Rather, the Michigan

Supreme Court held that the Michigan statute could not constitutionally require the exclusion of the effect of the contamination because to do so would remove a factor relevant to "market value." The Michigan Supreme Court interpreted this Court's precedent as standing for the proposition that just compensation means "that the proper amount of compensation for property takes into account *all* factors relevant to market value." (App., 10a-11a) (emphasis added).

As discussed below in "Reasons for Granting the Petition," Section II.A, in so holding the Michigan Supreme Court erroneously conflated what this Court calls the "working rule" of "market value" with the constitutional principle of "just compensation." According to this Court, the constitutional right of just compensation is an "indemnity principle" that requires placing the owner in the same position he would have been but for the taking. This Court has held that sometimes that right is secured by giving the owner "market value," but in other instances the "working rule" of "market value" does not secure that right and a different method must be used.

But the Michigan Supreme Court ignored this precedent and, based on its constitutional holding that "just compensation" = "market value," the court did not even reach the issue of statutory interpretation. It instead held the amendments to the UCPA adopted by the Michigan Legislature in 1993 could not be construed as excluding environmental contamination from the just compensation analysis because to do so would "place the legislators in the posture of acting unconstitutionally." (App., 12a). The Michigan Supreme Court then affirmed the trial court and reversed the Court of Appeals.

REASONS FOR GRANTING THE PETITION

I. The Supreme Courts of Four States are Divided Over Whether the Constitutional Right to "Just Compensation" Is Protected or Violated When Environmental Contamination Is Excluded from the Just Compensation Trial; This Presents a Recurring Problem as State and Local Governments Continue to Condemn Urban "Brownfields" for Redevelopment.

One core ground for granting a petition for a writ of certiorari is a conflict between state supreme courts regarding matters of federal law. S. Ct. Rule 10(b); *Illinois v. Wardlow*, 528 U.S. 119, 123 n.1, 120 S. Ct. 673, 675 n.1, 145 L. Ed. 2d 570 (2000) (certiorari granted to resolve conflict among state courts over "whether unprovoked flight is sufficient grounds to constitute reasonable suspicion" under the Fourth Amendment); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 753 & n.1, 105 S. Ct. 2939, 2942 & n.1, 86 L. Ed. 2d 593 (1985) (certiorari granted to resolve conflict among state courts over whether certain First Amendment protections previously determined by the U.S. Supreme Court apply to non-media defendants). In this case, the Michigan Supreme Court's decision deepens a clear conflict among state supreme courts regarding the meaning of just compensation under the Fifth Amendment.

Certiorari is also appropriate because this case "presents problems of difficulty and importance in the practical application of the general standard of just compensation." *U.S. v. Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 398, 70 S. Ct. 217, 219, 94 L. Ed. 195 (1949). *Accord Kimball Laundry Co. v. U.S.*, 338 U.S. 1, 4, 69 S. Ct. 1434, 1437, 93 L. Ed. 1765 (1949) ("[W]e granted the Laundry's petition for certiorari . . .

because it raised novel and serious questions in determining what is 'just compensation' under the Fifth Amendment."). This ground presents a second, alternative ground for further review in this Court.

A. Two State Supreme Courts Have Upheld the Exclusion Method as Protecting the Constitutional Right to Just Compensation, and Two Others Have Rejected It as Inconsistent with this Right.

The Supreme Courts of four states are divided over whether the exclusion method protects the constitutional right to "just compensation," or violates that right. Lining up in favor of the method are the Supreme Courts of Iowa and New Jersey, which have judicially adopted the method on constitutional grounds. Opposed to the method are the Supreme Court of Michigan and the Supreme Court of Connecticut (which, like the Michigan high court, overturned a lower court in reaching that result). The California legislature has adopted the method for condemnation actions brought by school districts.[3] Cal. Civ. Pro. Code § 1263.740 (2002).

Both the Iowa Supreme Court and the New Jersey Supreme Court adopted the exclusion method on the grounds that admitting evidence of contamination in the

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[3] Two other state Supreme Courts have addressed the issue of the admissibility of contamination where there are third-party funds available for remediation without directly reaching the constitutional issues for excluding or including such evidence. *Finkelstein v. Department of Transportation*, 656 So.2d 921, 924-925 (Fla. 1995) (where state fund covers remediation costs, the condemned property must be valued as if the cleanup has been completed, but testimony about contamination "stigma" and its effect on value is allowed if there is an "adequate factual predicate"); *City of Olathe v. Stott,* 861 P.2d 1287 (Kan. 1993) (where state fund covers some remediation costs, contamination still admissible to show reduction in value attributable to stigma and risk).

"just compensation" trial not only denies the owner "just compensation," but also denies him due process. *Suydam*, 826 A.2d 673; *Alladin*, 562 N.W.2d 608.

These two courts held that admission of the contamination evidence denies the property owner just compensation for several reasons. First:

> Before condemnation, the property owner holds the property at a certain fair market value [with] . . . possible legal liabilities for the contamination. However, before a landowner is held responsible for cleanup costs . . . the DNR . . . must prove the owner generated the contamination. If this procedure is not followed, and the value of the property condemned is reduced by the estimated cost of cleanup, the landowner will not receive just compensation because the award will be less than full value. In addition, the property owner will still have the same legal liability for cleanup cost as before.

Alladin, 562 N.W.2d at 615. Second, admitting such evidence would allow the condemning agency to do a "double take," where it gets the property at a reduced value and then later sues the owner in a cost-recovery action. *Suydam*, 826 A.2d at 686; *see also, e.g., Detroit v. A. W. Miller, Inc.*, 842 F. Supp. 957 (E.D. Mich. 1994) (condemning agency later sued owner in cost-recovery action; *res judicata* defense rejected by court). Third, including evidence of contamination defeats the just compensation mandate because it is difficult to identify "comparable" contaminated property sales and therefore the just compensation award "would be based on speculative information." *Alladin*, 562 N.W.2d at 616; *accord Suydam*, 826 A.2d at 686-87.

The New Jersey and Iowa Supreme Courts also reasoned that excluding the evidence of contamination protects the owner's right to due process. First, it allows the owner to raise defenses to liability in the cost-recovery action that are not available in the condemnation action.

Alladin, 562 N.W.2d at 615-16. Those defenses, such as the innocent landowner defense, have no effect in the just compensation trial, where valuation is the sole issue before the trial court. (In the present case, in a cost-recovery action under Michigan law, the District would have to prove that Extrusions was actually responsible for the contamination, something the District admitted it could not do when it waived its right to bring a cost-recovery action.) Second, other potentially responsible parties can be brought before the court in a cost-recovery action so that complete justice can be done among all parties responsible for the contamination. *Suydam*, 826 A.2d at 687. Otherwise, the owner bears the risk of having the full amount of contamination cleanup assessed against him in the just compensation trial without the ability to implead other parties that may also be responsible for the contamination.

For these important constitutional reasons, both the Iowa Supreme Court and the New Jersey Supreme Court judicially adopted the exclusion method which, as the New Jersey court noted, has received "widespread recognition." *Id.* (adopting a valuation based on "as remediated" rather than "as clean"); *Alladin,* 562 N.W.2d at 616. *Accord New Jersey Transit Corp. v. Cat in the Hat, LLC,* 826 A.2d 690 (N.J. 2003).

The Connecticut Supreme Court, on the other hand, rejected the exclusion method, and in so doing overruled or reversed several different decisions of the Superior Court of Connecticut. *Northeast Conn. Econ. Alliance v. ATC P'ship.*, 776 A.2d 1068 (Conn. 2001), *reversing Northeast Conn. Econ. Alliance, Inc. v. ATC P'ship., et al.*, 1998 WL 197632 (Conn. Super. Ct. 1998) (following the reasons advanced by *Nichols on Eminent Domain* for excluding environmental contamination) and *overruling sub silentio W.R. Assocs. of Norwalk v. Commissioner of Transp.*, 1999 WL 476278 (Conn. Super. Ct. 1999) (also following the reasons advanced by *Nichols on Eminent Domain* for excluding environmental contamination, but especially

concerned about the risk of double liability), and *Murphy v. Town of Waterford*, 1992 WL 170588 (Conn. Super. Ct. 1992) (not allowing setoff for remediation costs because town never showed that current owner was the cause of the contamination as required by environmental statutes).

In its decision, the Connecticut Supreme Court held that the exclusion method was inconsistent with "just compensation" requirements because it removed contamination from the "market value" determination:

> [W]e conclude . . . that, under traditional constitutional principles of just compensation, evidence of environmental contamination and remediation costs may not be excluded, as a matter of law, from a condemnation proceeding. . . .
>
> * * *
>
> As stated previously, just compensation is ordinarily calculated by determining the fair market value of the property on the date of the taking. Excluding contamination evidence, as a matter of law, is likely to result in a fictional property value – a result that is inconsistent with the principles by which just compensation is calculated.

776 A.2d at 1876 and 1080. As discussed above in Section D of "Statement of the Case", this is the exact same constitutional reason the Michigan Supreme Court gave in holding unconstitutional Michigan's legislatively enacted exclusion method.

B. This Constitutional Conflict Is a Recurring Problem Because Environmentally Contaminated Properties (also known as "Brownfields") Are Often Condemned for Public Purposes, Especially Urban Redevelopment Purposes.

That the issue of contamination in the condemnation context is now reaching the nation's state supreme courts

is no surprise. For about a decade now, federal, state and local governments have acted aggressively to put urban brownfields back into productive use. Often, the applicable local government uses its power of eminent domain to condemn the property, and then conveys the property to a private developer who is obligated to develop it in a manner that provides economic benefit to the community. Both the *Suydam* and the *Northeast Conn. Econ. Alliance* cases discussed in the preceding section involved this pattern of condemnation followed by private development.

Governments have also provided incentives through funding of remediation and tax benefits. For example, at the same time it enacted Michigan's exclusion method in 1993, the Michigan Legislature allocated $45 million to be used by local governments in cleaning up urban brownfields. Mich. Comp. Laws § 299.678 (1993) (repealed effective June 5, 1995; *now see* Mich. Comp. Laws § 324.19508); *see also* n.3, *supra*. Additionally, in 1997, Congress added new provisions to the Internal Revenue Code allowing immediate (rather than capitalized) tax deductions for qualifying environmental remediation expenditures. I.R.C § 198.

The Environmental Protection Agency offers a detailed website on the nuts and bolts of reclaiming brownfields for productive use. *See* www.epa.gov/brownfields. There is even an annual conference that assists local governments and developers. *See* www.brownfields2003.org. One of the seminars at this year's conference was entitled "How to Package a Brownfields Site for a Developer." *Id.* Another was "Hand Me the Hammer: Local Authorities as Tools for Brownfields" described as "Local redevelopment authorities are set up to revitalize blighted areas through . . . use of special powers to acquire land. . . ." *Id.*

This latest version of "urban renewal" has proved to be enormously effective in putting formerly abandoned brownfields back into productive use, and governments will continue to use their condemnation powers to effect this. A recent federal report estimates that the State of

Michigan has "leveraged nearly $460 million in private sector investment and helped create 5,342 new jobs" from an investment by the State of $35.6 million in brownfield redevelopment between 1995 and 1999. U.S. Dep't. of Housing and Urban Development, "Assessment of State Initiative to Promote Redevelopment of Brownfields" at 17 (Dec. 1999). The federal constitutional issue of whether contamination can be or must be excluded from the condemnation trial is an issue that will continue to divide the state courts. If the split among the state supreme courts that have already addressed the issue is any guide, the states will split almost evenly on this constitutional question. Only this Court is in a position to resolve the issue in a manner that will ensure uniformity among the nation's courts.

C. This Case Squarely Presents this Conflict Because Michigan's Exclusion Statute Was Struck Down by the Michigan Supreme Court as Unconstitutional.

This case squarely presents to this Court the constitutional issue of whether the Fifth Amendment right to "just compensation" and the Fourteenth Amendment right to "due process" require exclusion or inclusion of environmental contamination in the just compensation trial. The trial court allowed such evidence on the basis that it affects market value. The Michigan Court of Appeals reversed the trial court on the grounds that the Michigan exclusion statute prohibits such evidence, and such exclusion protects the just compensation and due process rights of the land owner. The Michigan Supreme Court then reversed solely on constitutional grounds. It held, as a matter of constitutional law, that because contamination is relevant to market value it *must* be included in the just compensation analysis. This case, then, squarely presents the issue of whether the Fifth Amendment requires that contamination evidence be excluded from or included in the just compensation determination.

II. The Michigan Supreme Court's Decision Is in Direct Conflict with This Court's Precedent.

An additional core ground for granting a petition for a writ of certiorari is where a state supreme court's holding is inconsistent with the precedents of this Court. S. Ct. Rule 10(c); *U.S. v. Estate of Romani*, 523 U.S. 517, 521-522, 118 S. Ct. 1478, 1482, 140 L. Ed. 2d 710 (1998); *see also U.S. v. Miller*, 317 U.S. 369, 370, 63 S. Ct. 276, 278, 87 L. Ed. 336 (1943) ("This case presents important questions respecting standards for valuing property taken for public use. For this reason, and because of an apparent conflict with one of our decisions, we granted certiorari."). This case presents just such a conflict, because the Michigan Supreme Court's constitutional definition of "just compensation" is directly at odds with this Court's takings jurisprudence.

A. This Court Has Held that Full Indemnity Is the Principle that Satisfies the Constitutional Mandate of "Just Compensation", and "Market Value" Is Merely a "Working Rule." The Michigan Supreme Court Erred in Conflating the Two.

The Michigan Supreme Court's decision is in direct conflict with this Court's precedents.

The Fifth Amendment "conditions the otherwise unrestrained power of the sovereign to expropriate, without compensation, whatever it needs." *U.S. v. General Motors Corp.*, 323 U.S. 373, 377, 65 S. Ct. 357, 359, 89 L. Ed. 311 (1945). "The word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity.'" *U.S. v. Virginia Elec. & Power Co.*, 365 U.S. 624, 631, 81 S. Ct. 784, 789-790, 5 L. Ed. 2d 838 (1961) (citation omitted). This means that the owner must be fully indemnified for his loss. *U.S. v. 564.54 Acres of Land*, 441 U.S. 506, 510-11, 99 S. Ct. 1854, 1857, 60 L. Ed. 2d 435 (1979). In fact, just last term

this Court reaffirmed this indemnity principle in the IOLTA trust account case:

> Most frequently cited is Justice Holmes' characteristically terse statement that "the question is what has the owner lost, not what has the taker gained." . . . A few years later we again noted that the private party "is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more."[4]

Brown v. Legal Found. of Washington, 528 U.S. 216, ___, 123 S. Ct. 1406, 1419, 155 L. Ed. 2d 376 (2003) (internal citations omitted).

This Court's precedents do not say that "just compensation" must always and everywhere be measured by "market value." Rather, full indemnity is always the constitutionally mandated goal, and market value merely the "working rule" of this "indemnity principle:"

> In short, the concept of fair market value has been chosen to strike a fair "balance between the public's need and the claimant's loss" upon condemnation of property for a public purpose.
>
> *But while the indemnity principle must yield to some extent before the need for a practical general rule, this Court has refused to designate market value as the sole measure of just compensation. For there are situations where this standard is inappropriate.*

564.54 Acres of Land, 441 U.S. at 512, 99 S. Ct. at 1857-58 (emphasis added; internal citations omitted).

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[4] The legislature does have the power, however, to authorize compensation greater than the constitutional minimum. *U.S. v. 50 Acres of Land*, 469 U.S. 24, 31 n.14, 105 S. Ct. 451, 455 n.14, 83 L. Ed. 2d 376 (1984).

The "working rule" of "market value" is inappropriate where it "would be impracticable" or where "an award of market value would diverge so substantially from the indemnity principle as to violate the Fifth Amendment." *Id.* at 513, 99 S. Ct. at 1858. *Accord Almota Farmers Elevator & Warehouse Co. v. U.S.*, 409 U.S. 470, 483, 93 S. Ct. 791, 799, 35 L. Ed. 2d 1 (1973) ("The notion of 'fair market value' is not a universal formula for determining just compensation under the Fifth Amendment."); *U.S. v. Commodities Trading Corp.*, 339 U.S. 121, 123, 70 S. Ct. 547, 549, 94 L. Ed. 707 (1950) ("This Court has never attempted to prescribe a rigid rule for determining what is 'just compensation' under all circumstances and in all cases. Fair market value has normally been accepted as a just standard. *But when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public, courts have fashioned and applied other standards.*") (emphasis added); *U.S. v. Cors*, 337 U.S. 325, 332, 69 S. Ct. 1086, 1090, 93 L. Ed. 1392 (1949) ("The Court in its construction of the constitutional provision has been careful not to reduce the concept of 'just compensation' to a formula. . . . [I]t has refused to make a fetish even of market value, since it may not be the best measure of value in some cases.").

In addition, even where market value is used, the Fifth Amendment's ultimate end of "fairness" may mean the *exclusion* of elements that technically affect market value:

> [Respondents] . . . insist that no element which goes to make up value . . . is to be discarded or eliminated. We think the proposition is too broadly stated. . . . [S]trict adherence to the criterion of market value may involve inclusion of elements which, though they affect such value, must in fairness be eliminated in a condemnation case. . . .

U.S. v. Miller, 317 U.S. at 374-75, 63 S. Ct. at 280.

This principle of full indemnification trumped the technical rule of market value in a World War II case where the Government condemned the temporary use of a warehouse that General Motors occupied as a tenant under a 20 year lease and had fitted with bins, etc., for the distribution and storage of automobile parts. *U.S. v. General Motors Corp.*, 323 U.S. 373, 65 S. Ct. 357. The Government claimed that "just compensation" meant "market value" and that "market value" was $0.35 per square foot. GM, on the other hand, claimed that it was entitled not only to rent per square foot (which it pegged at $0.43), but also to reimbursement for all of its costs for moving out temporarily and then moving back in later. The trial court denied the moving costs. This Court reversed the trial court on the grounds that even though "market value" would indeed be the per square foot rate, to make the owner (leaseholder) whole and fully indemnified, moving costs would need to be paid too:

> If [the trial court's] result be sustained . . . the Amendment's guaranty becomes, not one of just compensation for what is taken, but an instrument of confiscation fictionalizing "just compensation" into some such concept as the common law idea of a peppercorn in the law of seizen or the later one of "value received" in that of contractual consideration.

Id. at 381-82; 65 S. Ct. at 381.

The Michigan Supreme Court's holding irreconcilably conflicts with this Court's precedents. The Michigan high court failed to distinguish between the means of "market value" and the ends of full indemnity. Instead, it erroneously equated the indemnity "principle" with the market value "working rule" and held that "'just compensation' . . . means that the proper amount of compensation for property takes into account *all* factors relevant to market value." (App., 11a) (emphasis added). As such, the Michigan Supreme Court misinterpreted this Court's precedent and erred in holding that the Legislature's exclusion

method was unconstitutional. And, as a result, Extrusions was awarded $41,032 for property that the assessor valued at $264,600 *as contaminated*, and this award was based on estimated remediation costs which were never actually incurred by the District and for which Extrusions could never have been held responsible under the environmental laws. In other words, Extrusions has received approximately $65,000 less than it paid for the condemned property in 1982, and approximately $223,000 less than the property's fair market value as contaminated (as determined by the assessor), even though the District concedes that Extrusions itself has no environmental liability for the property. In addition, it is very likely that the District received reimbursement for all or substantially all of its project costs (including any remediation costs) from federal and state programs.

The touchstone of the Fifth Amendment is not market value, it is rather the principles of fairness and indemnity. "The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness as it does from technical concepts of property law." *Almota Farmers Elevator*, 409 U.S. at 478, 93 S. Ct. at 797) (internal citations omitted). This is the standard against which all methods of valuation must be measured. The Michigan Supreme Court's misinterpretation of this Court's pronouncements and misapplication of the valuation methods recognized by this Court should be corrected.

B. The Exclusion Method Furthers the Constitution's "Just Compensation" Mandate Because It Puts the Owner in the Position the Owner Would Have Been But for the Taking

The "basic measurement of compensation has been hedged with certain refinements developed over the years in the interest of effectuating the constitutional guarantee" of putting the owner "in the same position monetarily

as he would have occupied if his property had not been taken." *U.S. v. Reynolds*, 397 U.S. 14, 16, 90 S. Ct. 803, 805, 25 L. Ed. 2d 12 (1970). The exclusion method is one such refinement this Court should adopt because it vindicates the core indemnity and fairness principles of the Fifth Amendment. Using the strict market value approach to contaminated property is impractical and diverges so substantially from the indemnity principle as to violate the Fifth Amendment.

Under the exclusion method, an owner is treated exactly as it should be according to its *responsibility* for environmental contamination. If it is responsible for such contamination, it will pay its portion of remediation costs (as determined in a separate cost-recovery action) out of the fair market valuation placed in escrow. If the owner is not responsible, such as Extrusions, then the owner will get the entire amount of the estimated just compensation. The condemning agency is not thereby impoverished; it has acquired, along with the property, the owner's right to pursue responsible third-party polluters for indemnification. This right is just one stick in the "bundle of sticks" acquired by the condemning agency when it acquires title to the land.[5] If the condemning agency incurs cleanup costs, it can sue such polluters, be reimbursed for its response costs, and be made whole. If those polluters prove to be uncollectible, that is the risk the condemning agency took when it decided to condemn the property. After all, the Fifth Amendment is a guaranty to the owner, not to the state. In addition, the Legislature is well within its constitutional powers in adopting the exclusion method and laying the risk of uncollectibility at the feet of the condemning agency. *See* n.4, *supra*.

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[5] Technically, it is the owner's interest in the land that is condemned, not the land itself. 323 U.S. at 378, 65 S. Ct. at 359.

The exclusion method, then, is "just compensation neutral," because it requires merely that the environmental component be determined in a separate action and does not in any way impermissibly restrict the measure of just compensation. It ensures that the landowner is dunned for cleanup costs only if it is responsible for the contamination and thus guarantees that the owner is fully indemnified.

Moreover, as pointed out by the Michigan Court of Appeals and the Supreme Courts of Iowa and New Jersey, the exclusion method protects the just compensation and due process rights of the owner in other ways. For example, the method removes sheer speculation from the just compensation trial. Valuing property as contaminated is an extraordinarily difficult undertaking. *See discussion in Northeast Conn. Econ. Alliance, Inc. v. ATC P'ship., et al.*, 1998 WL 197632 at *10-*12. The District's expert testified that the process of adequately identifying and analyzing contamination and planning for the cleanup takes more than a year. Comparable properties that are comparably contaminated are unlikely to be available, and in the present case, the appraisers could identify none. In addition, the market price of any private transaction involving contaminated property is misleading, because these transactions almost always involve some indemnity between buyer and seller regarding contamination risks and costs. McMurry & Pierce, *Environmental Contamination and its Effect on Eminent Domain*, ALI-ABA 133, 169 (1993), *quoted in* 7A *Nichols on Eminent Domain* § 13B.04 n.11. For this reason, it is fanciful to believe that the "market value" of the property as contaminated is readily ascertainable.

Furthermore, the method protects the condemning agency from being impoverished. Regardless of the level of pre-taking investigation, the agency runs the risk of either missing possible environmental contamination or underestimating the cost of cleaning up such contamination and

thus over-valuing the property in its good faith estimate of value.

The exclusion method, then, as recognized by the Michigan Court of Appeals and the Supreme Courts of Iowa and New Jersey, is the only way to ensure vindication of the Fifth Amendment's principles of fairness and indemnity.

III. This Michigan Supreme Court's Decision Did Not Rest on an Independent and Adequate State Ground.

As discussed in Section D of the "Statement of the Case" and in Section II of "Reasons for Granting the Petition," the Michigan Supreme Court's ruling in this case conflicts with and erroneously interprets this Court's prior decisions and the theory of "just compensation" embodied in the Fifth Amendment to the United States Constitution. Thus, although the Michigan Supreme Court's decision discusses state statutory and constitutional provisions in addition to the Fifth Amendment, the decision squarely involves a federal question and is subject to this Court's review. *See generally Arizona v. Evans*, 514 U.S. 1, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995) (holding that this Court had jurisdiction where the "Arizona Supreme Court's decision . . . was based squarely upon its interpretation of federal law.").

CONCLUSION

The petition for a writ of certiorari should be granted to resolve a conflict among state supreme courts; to reaffirm the supremacy of this Court's takings jurisprudence; and to provide clear guidance to both federal and state courts as to the appropriate just compensation analysis in condemnation proceedings involving environmentally contaminated property.

Respectfully submitted,

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Date: October 29, 2003

Michigan Supreme Court
Lansing, Michigan 48909

	Chief Justice	Justices
Opinion	Maura D. Corrigan	Michael F. Cavanagh Elizabeth A. Weaver Marilyn Kelly Clifford W. Taylor Robert P. Young, Jr. Stephen J. Markman

FILED JUNE 17, 2003

SILVER CREEK DRAIN DISTRICT,

Plaintiff-Appellant,

v No. 119721

EXTRUSIONS DIVISION, INC., and
AZZAR STORE EQUIPMENT, INC,

Defendants-Appellees,

BEFORE THE ENTIRE BENCH

TAYLOR, J.

We granted leave to appeal in this case to consider whether environmental-contamination conditions are factors to be considered when a court is determining fair market value to establish just compensation in a condemnation action under the Uniform Condemnation Procedures Act (UCPA), MCL 213.51 *et seq*. We hold that they are to be considered. Accordingly, we reverse the judgment of the Court of Appeals in this regard and remand this matter to the trial court for further proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendant Extrusions Division, Inc. (Extrusions), operates a plastics extruding business and owned an eight-acre parcel of vacant land adjacent to its operations complex in Grand Rapids. In 1992, Extrusions applied to the city of Grand Rapids for a permit to build a warehouse on the eight acres. The application was denied, and Extrusions was informed that the Silver Creek Drain District (Drain District), in 1991, had identified the parcel as its desired site for a storm-water retention pond. Extrusions claimed that denial of a permit, together with the failure of the Drain District to commence a condemnation action, amounted to an unconstitutional taking of private property without just compensation. Accordingly, in 1992, Extrusions initiated an inverse-condemnation action against the city and the Kent County Drain Commissioner.

On March 7, 1994, the Drain District, pursuant to the UCPA, tendered a good-faith "just compensation" offer[1] in the amount of $211,300 to Extrusions for the parcel. This offer, as allowed under MCL 213.55(1) of the UCPA, also reserved the Drain District's right to proceed against Extrusions in a federal or state action for contamination-cost recovery.[2] Cost-recovery actions are intended to give

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[1] "Before initiating negotiations for the purchase of property, the agency shall establish an amount that it believes to be just compensation for the property and promptly shall submit to the owner a good faith written offer to acquire the property for the full amount so established. . . ." MCL 213.55(1).

[2] Cost-recovery proceedings may be brought under the federal Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 42 USC 9601 *et seq.*, or under part 201 of the Natural

(Continued on following page)

governmental authorities the ability to seek reimbursement from those responsible for the damage done to the land by the release of hazardous substances. At the time of this litigation, the procedure to reserve the right to bring a cost-recovery action against the condemnee was new, having been established by amendments of the UCPA in 1993. The purpose of the amendments was not merely to allow the condemnor to reserve the right to demand remediation costs, but also to ensure that, if a reservation of rights occurred, the funds for condemnation would be escrowed to satisfy any judgment that the condemnor might eventually secure against the condemnee.[3]

Resources and Environmental Protection Act (NREPA), MCL 324.20101 *et seq.*

[3] As discussed above, § 5 of the amended UCPA (MCL 213.55) requires a condemning agency to deposit its estimated just compensation amount in escrow when it files the condemnation complaint; this escrowed amount is to pay the condemnee upon the order of the court. MCL 213.55(5) ; MCL 213.58(4). However, in the 1993 amendments of the UCPA, in order to facilitate the collection of remediation costs of environmental contamination, the Legislature allowed the agency, when it submits a "good faith" written offer, to reserve the right to seek contamination costs from the condemnee. If this is done, the escrowed funds may remain in escrow "as security for remediation costs of environmental contamination. . . ." MCL 213.58(2).

However, even if the governmental agency reserves the cost-recovery option against a condemnee, under subsection 6a (MCL 213.56a) a court can order an agency to waive its right to pursue a cost-recovery action under certain circumstances. The predicate for seeking this reversal of the agency's election is that, under part 201 of the NREPA, the condemnee has no liability because it did not cause the contamination. MCL 213.58(3). If the court orders the waiver of the rights, the agency is required to submit a revised good-faith offer. Subsection 6a(3) also allows the parties to a condemnation action to stipulate the reversal of the reservation.

On May 26, 1994, the Drain District executed, as required by MCL 213.55(4)(e), a "declaration of taking," which indicated that this private property was being taken for purposes of a necessary public improvement.

In June, the $211,300 good-faith "just compensation" amount was placed in escrow. The Drain District then filed its condemnation action and again reserved the right to bring a federal or state cost-recovery action.

On February 20, 1995, the parties stipulated, and the trial court ordered, that the parcel be conveyed to the Drain District and that the Drain District pay Extrusions $211,300 for the taking. Following this, the Drain District, notwithstanding the stipulation and order, sought an order that would hold the funds in escrow as security for the remediation costs as allowed under the UCPA. Extrusions, in response, citing part 201 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.20101 *et seq.*, claimed that it was not the cause of the contamination as identified in the amendments and, thus, was not liable for remediation costs. Accordingly, it argued, on the authority of MCL 213.55(5) and MCL 213.58(4), that the funds should be released. On November 3, 1995, by stipulation, the court ordered the escrowed sums, as well as interest, paid to Extrusions.

In a 1997 bench trial concerning valuation, the court found that the value of the eight-acre parcel, if environmental concerns were ignored, was $278,800. The court then determined that the parcel "was an environmentally contaminated site, with respect to which a reasonably prudent purchaser would have required, at a minimum, a formal Type-C Closure from the [Department of Natural Resources] as a condition precedent to closing."

Because the court found that the reasonable cost of the Type-C closure was $237,768, it concluded that the net fair market value was $41,032. The court entered an order to that effect and reiterated in the order that the once-escrowed $211,300 was awarded to Extrusions.

On appeal, the Court of Appeals reversed in part and remanded the case to the trial court.[4] The Court of Appeals held that the UCPA gave no authority for a court to consider any contamination factor in the establishment of fair market value. Rather, contamination could only be considered in separate proceedings for remediation costs. It was the Court's position that this outcome was appropriate because § 5 of the UCPA provided "little guidance regarding the factors a court should consider when called on to determine just compensation."[5] Given the minimal guidance, the Court concluded that the plain language of the UCPA amendments addressing federal and state cost-recovery actions meant that only in those separate proceedings could such factors be considered.

We granted leave to appeal to consider the Drain District's claim that a court may consider a parcel's environmental condition as a factor affecting fair market value in a determination of just compensation under the UCPA. We conclude that a court may consider such conditions in establishing fair market value and, thus, reverse the judgment of the Court of Appeals on this issue only.

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[4] 245 Mich App 556, 557-558; 630 NW2d 347 (2001).

[5] *Id.* at 563.

II. STANDARD OF REVIEW

This case presents an issue of statutory interpretation of UCPA provisions. Statutory interpretation is a question of law that we review de novo. *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 594; 648 NW2d 591 (2002).

III. ANALYSIS

"Eminent domain" or "condemnation" is the power of a government to take private property. The power arises from the sovereign power of the state and is of ancient provenance.[6] The federal government's power in this regard is found in the Fifth Amendment of the United States Constitution, in which it is stated that the government may not take private property unless it is done for a public use and with just compensation. Every Michigan constitution has had a similar clause requiring just compensation in these circumstances.[7] Our current Constitution states that: "[p]rivate property shall not be taken for public use without just compensation. . . ."[8]

In Michigan, in furtherance of this constitutional power, statutes have regulated the exercise and procedure of condemnation. In 1980, the Legislature unified all condemnation statutes in the UCPA. Under the act, echoing the Constitution, it was stated at MCL 213.55(1)

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[6] See *Magna Carta*, Grant 39 (1215): "No freeman shall be . . . disseised . . . unless by the lawful judgment of his peers, or by the law of the land."

[7] See Const 1835, art 1, § 19; Const 1850, art 18, § 2; Const 1908, art 13, § 1.

[8] Const 1963, art 10, § 2.

that a court was to "... ascertain and determine just compensation to be made for the acquisition of the [condemned] property."

As is evident, the "just compensation" requirement in the statute mirrors the identical requirement in our Constitution. This reiteration of the constitutional language is significant because to the degree the Constitution has been construed to outline the nature of "just compensation," the statute must be similarly construed because no act of the Legislature can take away what the Constitution has given. *Sharp v City of Lansing*, 464 Mich 792, 810; 629 NW2d 873 (2001).

Thus, we must determine the meaning of the phrase "just compensation" in our Constitution. As we recently outlined in *Michigan Coalition of State Employee Unions v Civil Service Comm*, 465 Mich 212, 222-223; 634 NW2d 692 (2001), in analyzing constitutional language, the first inquiry is to determine if the words have a plain meaning or are obvious on their face. If they are, that plain meaning is the meaning given them. If, however, the constitutional language has no plain meaning, but is a technical, legal term, we are to construe those words in their technical, legal sense. Moreover, in that undertaking, we are to rely on the understanding of the terms by those sophisticated in the law at the time of the constitutional drafting and ratification. The rule is, as we said in *Michigan Coalition*, that "if a constitutional phrase is a technical legal term or a phrase of art in the law, the phrase will be given the meaning that those sophisticated in the law understood at the time of enactment unless it is clear from

the constitutional language that some other meaning was intended."[9]

The meaning of "just compensation" cannot be discerned merely by a careful reading of the phrase. The words themselves, as the Court of Appeals found, just do not inform a court about the potential complexity and variety of factors to be considered in determining value.[10] This circumstance is not unusual in the realm of statutory construction. For example, it can be seen also when statutes, as they occasionally do, use words such as "negligence," "due process," or "equity." These are words with meanings that are not generally self-evident from a mere reading of the words or an assessment of their definitions

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[9] 465 Mich 223. We also pointed out in *Michigan Coalition, id.* at n 9, that the same rule, pursuant to the Legislature's directive at MCL 8.3a, applies to the construction of a statute.

[10] It is, perhaps, useful to illustrate the correctness of the point, inasmuch as the partial concurrence and dissent of Justice Weaver asserts the contrary. In establishing value for residential properties, for example, can sentimental factors such as long-time ownership or historic importance be considered? Or in the case of commercial properties, can business interruption be considered in establishing value and, if so, how? Should an income-capitalization approach be considered in a business valuation, or should some other approach, such as cost-less-depreciation or sales of comparable properties be used to assist in fixing value? As is obvious, one cannot merely review the dictionary definitions of "just" and "compensation" and combine them to produce a coherent meaning for this phrase. Rather, as a result of longstanding legal practice and custom, as revealed through countless judicial opinions over the centuries, this phrase means something more than the sum of its discrete parts. That juries would make decisions on these issues, after being instructed on the law, is not contradictory to the point we raise. That is always the process whether the statute at issue is susceptible to plain-meaning analysis or is interpreted using some other method of statutory explication.

in a dictionary. They are, in this respect, unlike self-evident words such as "bridge," "road," "building," or "horse." Rather, they are words that fall into that category we have described as technical legal terms or phrases of art in the law, and thus they are to be given the meaning that those sophisticated in the law gave them at the time of enactment. We believe it is necessary, if the law is to be applied uniformly across the state, that this class of words-words that are freighted with historic meaning-be given the same legal meaning in all our courts rather than allowing each court to impose its own meaning. to [sic] hold otherwise would all but ensure in similar cases different outcomes in different courts, as Justice Weaver, drawing from her opinion would apparently be content to allow. This means that, in this case, it is appropriate to review the consensus understanding in 1963, by those skilled in this area of law, of the meaning of "just compensation."

Throughout our history and clearly by the 1960s, it was uncontroversial that a determination of "just compensation" required the consideration of all the multiplicity of factors that go into making up value. In the nineteenth century, while summarizing just compensation and its meaning in American constitutional law, Michigan Supreme Court Justice Thomas M. Cooley, in his treatise *The General Principles of Constitutional Law in the United States of America*, said:

> The rule by which compensation shall be measured is not the same in all cases, but is largely affected by the circumstances. If what is taken is the whole of what the owner may have lying together, it is clear that he is entitled to its value, judged by such standards as the markets and the opinions of witnesses can afford, and that this,

> except in extraordinary cases, must be the full measure of his injury.[11]

The United States Supreme Court has had a similar and unvarying view of this matter, holding in *Searl v Lake Co School Dist No 2*, 133 US 553, 564; 10 S Ct 374; 33 L Ed 740 (1890), that the value of land must include "every . . . element entering into its cash or market value, as tested by its capacity for any and all uses. . . ." Then, again, in 1933, the Supreme Court held that "[t]he requirement that 'just compensation' shall be paid is comprehensive and includes all elements. . . ." *Seaboard A L R Co v United States*, 261 US 299, 306; 43 S Ct 354; 67 L Ed 664 (1923) ; accord *Jacobs v United States*, 290 US 13, 16-17; 54 S Ct 26; 78 L Ed 142 (1933). The calculation is to "include any element of value that [property] might have by reason of special adaptation to particular uses." *Clark's Ferry Bridge Co v Pub Service Comm*, 291 US 227, 238; 54 S Ct 427; 78 L Ed 767 (1934). Yet again in 1956, the high court held that "[j]ust compensation includes all elements of value that inhere in the property. . . ." *United States v Twin City Power Co*, 350 US 222, 250-251; 76 S Ct 259; 100 L Ed 240 (1956).[12]

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[11] Cooley, *Constitutional Law* (Boston; Little, Brown and Co, 1880), p 341.

[12] This continues to be the universal rule. As it was stated more recently, just compensation "has been held to be equivalent to the full value of the property. All elements of value inherent in the property merit consideration in the valuation process. "4 Nichols, Eminent Domain (rev 3d), ch 12, § 12.01, pp 12-2 to 12-3.

Michigan's understanding of just compensation has been identical in all relevant particulars.[13] In *In re Widening of Gratiot Avenue*, 294 Mich 569, 574-575; 293 NW 755 (1940), we explained that "'[t]he determination of value is not a matter of formulas or artificial rules, but of sound judgment and discretion based upon a consideration of all the relevant facts in a particular case.'" In considering various factors, we have held that compensation may include an award for the taking of leasehold, see *id.*; for fixtures, see *In re Slum Clearance*, 332 Mich 485; 52 NW2d 195 (1952); for business-interruption expenses, see *In re Grand Haven Hwy*, 357 Mich 20; 97 NW2d 748 (1959); and even for the increase in value attributable to the reasonable probability that the property would be rezoned, see *State Hwy Comm'r v Eilender*, 362 Mich 697; 108 NW2d 755 (1961). Thus, in our law, "just compensation" was a legal phrase of art in 1963 that meant, and still means, that the proper amount of compensation for property takes into account all factors relevant to market value.[14] It is this meaning that the constitutional drafters and ratifiers are held to have understood when they were adopting the Michigan Constitution of 1963, and a similar understanding is attributed to the legislators, who also

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[13] The effect on market value of the condemnation proceeding itself may not be considered as an element of value. MCL 213.70(1); *In re Urban Renewal, Elmwood Park Project*, 376 Mich 311, 318; 136 NW2d 896 (1965).

[14] We reiterated the general rule recently in *Dep't of Transportation v Van Elslander*, 460 Mich 127, 129-130; 594 NW2d 841 (1999), where we described what is relevant to just compensation as "any evidence that would tend to affect the market value of the property as of the date of the condemnation. . . ."

used the phrase "just compensation" when they enacted the UCPA in 1980.

That the legislators who amended the UCPA in 1993 provided the procedures and means for securing remediation costs and dovetailed those with the just-compensation determination indicates no intent to abrogate the meaning of "just compensation" established in our jurisprudence. Indeed, to attribute such an intent, i.e., the intent to diminish a constitutional standard by statute, is to place the legislators in the posture of acting unconstitutionally. This we avoid unless no other construction is possible[15] and, as such an alternate construction is possible, we adopt it.

The Court of Appeals error was to utilize the plain-language doctrine in a context where it was inapplicable. The phrase "just compensation" cannot be analyzed on the basis of the plain understanding each word conveys, but is a phrase of art that imports with it all the understandings those sophisticated in the law give it.

Moreover, we agree with the argument made in the brief amicus curiae of the Attorney General, on behalf of the Michigan Department of Transportation, that the Court of Appeals was led to error by the commingling of two different concepts: (1) accounting for contamination in a determination of fair market value and (2) making an assessment of liability and damages for the cost of remediation of environmental contamination.

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[15] See *Gora v Ferndale*, 456 Mich 704, 722 n 15; 576 NW2d 141 (1998).

As the Attorney General pointed out, a condemnation action is an in rem proceeding governed by the UCPA. It is instituted to allow a state agency to take title to privately owned property; thus, the agency and the owner are parties. An essential part of the proceeding is the determination of the fair market value of the property. Because this proceeding is not designed to assign liability for environmental contamination, the value of the property is unaffected by whether its owner would be liable for the contaminated state of the property. The estimated costs of remediation are relevant only as they pertain to the fair market value of the property.

In contrast, a cost-recovery action under Michigan's environmental-cleanup laws is an in personam proceeding specifically designed to assign liability for remediation costs. Those costs are typically sought under CERCLA or the NREPA and the fair market value of property is not relevant in such proceedings. Further, in a cost-recovery action, in addition to the agency and the owner, any other person or entity, such as prior owners, lessees, adjacent property owners, or other third parties who may have contributed to the contamination, may be parties. Finally, that the damages awarded in a cost-recovery action are different, sometimes dramatically so, from the amount by which contamination reduced fair market value,[16] makes manifest how different these proceedings are. What is to be grasped, then, is that the primary connection between a condemnation proceeding and a cost-recovery action is the

[16] The actual cost of remediation in this case was approximately $2.3 million, while the loss of value caused by the contamination was found by the trial court to be $237,768.

escrow that may be created during the condemnation proceeding to provide security for the payment of the potential cost-recovery award.

The trial court, we believe, understood this matter properly and merely considered contamination as one factor, albeit a significant one, in establishing a fair market value. It was the trial judge's conclusion that any purchaser would have insisted on a minimal cleanup (the Type-C closure) that would have made the property useable. The cost of this Type-C closure is far different from the amount remediation would have cost.[17] Thus, we conclude that the trial court made its just-compensation determination not on the basis of Extrusions' liability for cleanup costs, but on the basis of the effect of contamination on the parcel's fair market value. This was an appropriate way to consider contamination in a just-compensation proceeding under the UCPA.

We reverse that portion of the judgment of the Court of Appeals holding that the UCPA does not vest courts with the authority to consider contamination and how it affects fair market value when determining just compensation in a condemnation proceeding. In all other respects, we affirm the Court of Appeals and remand this case for proceedings consistent with this opinion.

Clifford W. Taylor
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman

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[17] See n 16.

CAVANAGH, J. *(concurring).*

Although the majority arrives at the correct result, it unnecessarily reaches a constitutional issue. We have stated previously, "there exists a general presumption by this Court that we will not reach constitutional issues that are not necessary to resolve a case." *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993); see also *Taylor v Auditor General*, 360 Mich 146, 154; 103 NW2d 769 (1960). Because resolution on statutory grounds alone would suffice, I would not reach the constitutional issue.

Additionally, I write separately to note that I am concerned about the majority's focus on original intent. As I noted in my concurrence in *WPW Acquisition Co v City of Troy*, 466 Mich 117, 128-130; 643 NW2d 564 (2002), the drafters' intent is but one method among many useful in the endeavor to properly interpret our constitution.

Michael F. Cavanagh
Marilyn Kelly

WEAVER, J. *(concurring in part and dissenting in part).*

I concur in the result only of the majority. I write separately to express my disagreement with the majority's construction of the constitutional concept, "just compensation."[1] The majority suggests that "just compensation" is a

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[1] Article 10, § 2 of the Michigan Constitution provides:

Private property shall not be taken for public use without just compensation therefor being first made or secured in a

(Continued on following page)

"technical legal term or phrase of art" that cannot be grasped by those not "sophisticated in the law." *Ante* at 10. This incorrect suggestion leads the majority to conclude that the meaning of "just compensation" must be restricted to the "consensus understanding in 1963, by those skilled in this area of the law, of the meaning of 'just compensation.'" *Ante* at 11.

While it may be that the understanding of "just compensation" of those sophisticated in the law of condemnation in 1963 may not differ significantly from that of the common person, either past or present, this Court should not engage in a method of constitutional construction that unnecessarily sidesteps the long-established primary rule of constitutional construction. The primary rule[2] of constitutional construction is that constitutional language is to be interpreted according to "common understanding" as described by Justice Cooley:

> "A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the

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manner prescribed by law. Compensation shall be determined in proceedings in a court of record.

This case was brought under the Uniform Condemnation Procedures Act, MCL 213.51 et seq., which prescribes the manner in which just compensation is "first made or secured" pursuant to Const 1963, art 10, § 2.

[2] If the plain meaning is unascertainable, secondarily, "the circumstances surrounding the adoption of the constitutional provision and the purpose sought to be accomplished may be considered. . . . Finally, whenever possible, an interpretation that does not create constitutional invalidity is preferred to one that does." *State Highway Comm v Vanderkloot*, 392 Mich 159, 179; 220 NW2d 416(1974) (opinion by Williams, J.)

> great mass of the people themselves, would give it. '. . . the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding. . . .'" [*Traverse City School Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971).]

The Supreme Court has reiterated this primary rule of constitutional construction: "Each provision of a State Constitution is the direct word of the people of the State, not that of the scriveners thereof." *Lockwood v Comm'r of Revenue*, 357 Mich 517, 565; 98 NW2d 753 (1959). Thus, when attempting to interpret a constitutional provision, "'the primary source for ascertaining its meaning is to examine its plain meaning as understood by its ratifiers at the time of its adoption.'" *People v Bulger*, 462 Mich 495, 507; 614 NW2d 103 (2000), quoting *Charles Reinhart Co v Winiemko*, 444 Mich 579, 606; 513 NW2d 713 (1994).

Thus, the issue in this case is whether the term "just compensation" can be said to possess a "plain meaning." Contrary to the majority's suggestion, the meaning of "just compensation" is neither difficult to discern nor does it require "sophistication in the law" to be grasped. *Ante* at 9-10, generally.[3]

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[3] In certain circumstances, it is appropriate and necessary to consider the meaning of constitutional terms that are established in the law. See, e.g., *Michigan United Conservation Clubs v Secretary of State* (After Remand), 464 Mich 359, 414-420; 630 NW2d 297 (2001) (WEAVER, J., dissenting) (construing "acts making appropriations" in art 2, § 9 of the Michigan Constitution), and *WPW Acquisition Co v City*

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"Just compensation" has long been readily and reasonably understood to be that amount of money that puts the property owner whose property is taken in as good, but not better, a financial position after the taking as the property owner enjoyed before the taking.[4] The measure of "just compensation" is "the property owner's loss rather than the government's gain."[5]

Though determining the dollar figure that most accurately describes the property owner's loss can be a complicated task, such complication does not render "just compensation" a "technical legal term or phrase of art." Indeed, though complicated, that task was expressly dedicated by the 1850 and 1908 constitutions of Michigan to a jury of "twelve freeholders, residing in the vicinity of such property, or by not less than three commissioners, appointed by a court of record, as shall be prescribed by law. . . ." Const 1850, art 18, § 2; Const 1908, art 13, § 2. Further, this Court has said of condemnation proceedings, "the jury is the judge of law and fact. Its conclusions need

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of Troy, 466 Mich 117, 123; 643 NW2d 564 (2002) (holding unconstitutional the Legislature's definition of a statutory term that conflicted "with the established meaning of the term at the time that it was" adopted by constitutional amendment).

[4] *Wayne Co v Britton Trust*, 454 Mich 608, 622; 563 NW2d 608 (1997); *In re Edward J Jefferies Homes Housing Project*, 306 Mich 638, 650; 11 NW2d 272 (1943); *In re Widening of Bagley Ave*, 248 Mich 1, 5; 226 NW 688 (1929).

[5] *Brown v Legal Foundation of Washington*, __ US __, __; 123 S Ct 1406, 1419; 155 L Ed 2d 376 (2003), in which the United States Supreme Court reiterated that "[t]his conclusion is supported by consistent and unambiguous holdings in our cases." See also *Boston Chamber of Commerce v Boston*, 217 US 189, 195; 30 S Ct 459; 54 L Ed 725 (1910).

not be based entirely on the testimony but it may use its own judgment and knowledge from a view of the premises and its experience as freeholders." *Dep't of Conservation v Connor*, 316 Mich 565, 593; 25 NW2d 619 (1947).[6] While the task of quantifying just compensation can be a complicated task, in light of this history, it cannot seriously be suggested that the concept of "just compensation" is anything but obvious on its face.

In addition, I write to express concern with the majority's adoption of a one-size-fits-all rule in the context of just compensation. The majority asserts that contamination costs must be considered in just-compensation determinations or the court would "place the legislators in the posture of acting unconstitutionally." *Ante* at 14.[7] This conclusion is certainly debatable. The statute at issue provides:

> Before initiating negotiations for the purchase of property, the agency shall establish an amount that it believes to be just compensation for the property and shall submit to the owner a

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[6] Under the current constitutional and statutory framework, a just-compensation award is determined by a jury or the court. Const 1963, art 10, § 2 provides in pertinent part that "[c]ompensation shall be determined in proceedings in a court of record." MCL 213.63 provides in pertinent part, "[t]he jury or the court shall award in its verdict just compensation for each parcel."

[7] The majority notes that "the primary connection between a condemnation proceeding and a cost-recovery action is the escrow that may be created during the condemnation proceeding to provide security for the payment of the potential cost recovery award." *Ante* at 16. However, the existence of the escrow mechanism does not answer whether the Legislature intended that the cost of remediation should be considered in condemnation proceedings.

> good faith written offer to acquire the property for the full amount so established. . . . The good faith offer shall state whether the agency reserves or waives its rights to bring federal or state cost recovery actions against the present owner of the property arising out of a release of hazardous substances at the property and the agency's appraisal of just compensation for the property shall reflect such reservation or waiver. The amount shall not be less than the agency's appraisal of just compensation for the property. . . . [MCL 213.55(1).]

The statute's express consideration of what compensation is just under the constitution does not necessarily mean that the Legislature intended, or was constitutionally obligated to require, that a good-faith offer be reduced by the cost of remediation in order to constitute "just compensation." Though market value typically serves as a measure of just compensation, it is not the sole criterion. As recognized by the United States Supreme Court, where the market value is "too difficult to find" or the "payment of market value would result in 'manifest injustice' to the owner or the public," the market value should not be the measure of just compensation. *Kirby Forest Industries, Inc v United States*, 467 US 1, 10; 104 S Ct 2187; 81 L Ed 2d 1 (1984).

Because the effect of contamination on the value of a property is difficult to determine and is susceptible to different remediation and calculation approaches, it is perhaps more appropriate to leave this fact-laden and case-specific determination to the judge or jury rather than the majority's one-size-fits-all formula or artificial rule. A determination by a judge or jury is consistent with this Court's prior holdings that just-compensation awards

in condemnation proceedings should be decided on a case by case basis. "[T]he determination of value in condemnation proceedings is not a matter of formula or artificial rules but of sound judgment and discretion based upon a consideration of all relevant facts in a particular case." *In re Grand Haven Hwy*, 357 Mich 20, 28-29; 97 NW2d 748 (1959), citing *In re Widening of Gratiot Avenue*, 294 Mich 569; 293 NW 755 (1940).

Elizabeth A. Weaver

STATE OF MICHIGAN
COURT OF APPEALS

SILVER CREEK DRAIN DISTRICT, Plaintiff-Appellee, v EXTRUSIONS DIVISION, INC., Defendant-Appellant, and AZZAR STORE EQUIPMENT, Defendant.	FOR PUBLICATION May 4, 2001 9:00 a.m. No. 216182 Kent Circuit Court LC No. 94-002550-CC
EXTRUSIONS DIVISION, INC., Plaintiff-Appellant, v CITY OF GRAND RAPIDS and KENT COUNTY DRAIN COMMISSION, Defendants-Appellees.	No. 216644 Kent Circuit Court LC No. 92-078727-CZ

Before: Smolenski, P.J., and Zahra and Collins, JJ.

ZAHRA, J.

In these consolidated cases, appellant Extrusions Division, Inc. (Extrusions) appeals by leave granted, challenging the trial court's finding of just compensation for a parcel of real property subject to a taking by Silver Creek Drain District (the Drain District). We reverse and

remand for further proceedings consistent with this opinion.

I FACTS

The land at issue is located in Grand Rapids, and is referred to by the parties as "Old South Field." Extrusions purchased Old South Field in 1982, intending to use it for future expansion of its North Complex, which is adjacent to Old South Field.[1] Extrusions built a fence around Old South Field following its purchase, but otherwise left the property vacant and unimproved. In 1990, the Drain District began evaluating options for alleviating flooding in the area. Through a series of public meetings it was disclosed that Old South Field was an excellent location for construction of a storm water detention pond.

In January 1992, Extrusions applied for a permit from the City of Grand Rapids to construct a warehouse on Old South Field. The city refused to grant the permit. On October 2, 1992, Extrusions filed an inverse condemnation action against the city and the Kent County Drain Commission. Extrusions claimed the city's refusal to grant the building permit, and the failure of the drain commission to "pursue a purchase" of Old South Field, constituted an unconstitutional taking of private property without just compensation.

On March 7, 1994, the Drain District provided Extrusions a "just compensation" offer for Old South Field in the

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[1] Extrusions' owner, James Azzar, also operates Azzar Store Equipment from the North Complex site. Azzar Store Equipment was dismissed from the suit below and is not a party to this appeal.

amount of $211,300. The Drain District stated within its offer that it reserved its right to bring a federal or state cost recovery action regarding the release of hazardous substances on the property. The parties stipulated below that "some alleged hazardous substances were disposed of or placed on the Old South Field" by the party that owned the property prior to Extrusions. On May 26, 1994, the Drain District executed a "Declaration of Taking," declaring that Old South Field was being taken to effect a necessary public improvement. The Declaration of Taking was recorded with the Kent County Register of Deeds on June 6, 1994. On June 21, 1994, the County Treasurer executed an affidavit attesting to the deposit of $211,300, the amount estimated as just compensation for Old South Field. On June 29, 1994, the Drain District filed its condemnation action.[2] In its complaint, the Drain District again reserved its right to bring a federal or state cost recovery action regarding the release of hazardous substances on the property.

On February 20, 1995, pursuant to stipulation of the parties, the trial court ordered Old South Field conveyed to the Drain District and ordered the Drain District to pay Extrusions $211,300 for the taking. Despite the February 20 stipulation, on April 21, 1995, the Drain District brought a motion requesting that the funds remain in escrow as security for remediation costs associated with environmental contamination of Old South Field. The Drain District estimated the total environmental remediation cost to be

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[2] On May 10, 1995, the Kent Circuit Court consolidated Extrusions' inverse condemnation action and the Drain District's condemnation action.

$467,100. Extrusions argued for release of the escrow funds, claiming it was not liable for remediation costs of any environmental contamination on the property.[3] On November 3, 1995, pursuant to stipulation of the parties, the trial court ordered the Drain District to remove from escrow and pay Extrusions the $211,300 offered as just compensation together with interest from the date of conveyance.[4] The Drain District complied with that order and paid those sums.[5]

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[3] Extrusions cited the newly amended Natural Resources and Environmental Protection Act (NREPA), MCL 324.20102 and 324,20126; MSA 13A.20102 and 13A.20126, in claiming it was not liable.

[4] In its brief on appeal, the Drain District explains that it viewed the amendments to the NREPA as allowing only cause-based liability for environmental contamination and, "not wanting to incur the cost of trying to meet [the burden of proving that Extrusions caused the environmental contamination on the property], entered into a stipulation and order releasing the escrow."

[5] In it [sic] reply brief on appeal, Extrusions argues the Drain District waived its right to pursue any cost recovery action against Extrusions and, therefore, should not be allowed to recover, by way of a just compensation trial, what it refused to pursue through the procedures established by the UCPA. Extrusions notes that, in addition to stipulating to the release of the escrow funds, the Drain District's counsel made clear below that the Drain District did not intend to pursue a remediation claim against Extrusions. The Drain District's counsel stated during a motion hearing "we will never sue them for cleanup costs."

As discussed in detail *infra*, our holding that the trial court erred in determining the amount of just compensation for the taking of Old South Field is based on the plain language of the Uniform Condemnation Procedures Act. Whether the Drain District waived its right to bring separate cost recovery actions is not dispositive of this case. That issue would arise if and when the Drain District brings such an action. We make no determination as to whether the Drain District, in fact, waived any future cost recovery action.

A bench trial commenced almost two years later on the issue of valuation of Old South Field. On November 6, 1997, the trial court issued an opinion, finding that the value of Old South Field at the time of the taking, without consideration of environmental cleanup costs, was $278,800. The court then found:

> At the time of the taking, Old South Field was an environmentally contaminated site, with respect to which a reasonably prudent purchaser would have required, at a minimum, a formal Type-C Closure from the DNR as a condition precedent to closing.

The court determined that the reasonable cost of securing such a formal Type-C clearance was $237,768. Subtracting that amount from the value of the property without consideration of environmental cleanup costs, the court arrived at the sum of $41,032, which it concluded was the net fair market value of the property and constituted just compensation on the date of the taking. On January 6, 1998, the court issued a final order, stating Extrusions is "entitled to keep all amounts previously paid to it [by the Drain District]" and dismissing all other claims.[6]

On appeal, Extrusions presents three arguments to support the conclusion the trial court erred in determining

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[6] We note the apparent inconsistency of the trial court's final order allowing Extrusions to keep the amount previously paid to it (apparently $211,300 plus interest from the date of conveyance) given its finding of just compensation in the amount of $41,032. We further note that Extrusions' issues on appeal are not moot in light of the trial court's order allowing it to keep the amounts paid out of escrow because Extrusions claims it is entitled to a greater amount as just compensation than was paid by the Drain District.

the amount of just compensation for the taking of Old South Field.[7] First, Extrusions argues the trial court should not have considered the environmental contamination and potential cleanup costs when it calculated just compensation for the property. Second, Extrusions argues the trial court erred in its determination that the fair market value of Old South Field, without regard to environmental cleanup costs, was $278,800. Third, Extrusions claims the trial court erred by failing to consider and award damages caused to the North Complex as a consequence of the condemnation of Old South Field. Each issue is addressed separately.

II ANALYSIS

A. Can environmental contamination and cleanup costs be considered in determining just compensation in a condemnation action?

Our federal and state constitutions prohibit the taking of private property without just compensation. US Const, Am V; Const 1963, art 10, § 2. Just compensation is the full monetary equivalent of the property taken. *Dep't of Transportation v VanElslander*, 460 Mich 127, 129; 594 NW2d 841 (1999), quoting *K&K Construction, Inc v Dep't of Natural Resources*, 217 Mich App 56, 72-73; 551 NW2d 413 (1996), rev'd on other grounds 456 Mich 570 (1998). The purpose of just compensation is to put a property owner in as good a position as it would have been if the

[7] Six of the seven issues on appeal identified by Extrusions relate to the single issue whether the trial court properly considered environmental contamination and potential cleanup costs when determining just compensation.

taking had not occurred. *Wayne Co v Britton Trust*, 454 Mich 608, 622; 563 NW2d 674 (1997).

Michigan has adopted the Uniform Condemnation Procedures Act (UCPA), MCL 213.51 *et seq.*; MSA, 8.265(1) *et seq.*, which provides procedures for the condemnation, acquisition, or exercise of eminent domain of real property by public agencies. We review de novo issues arising from the interpretation and application of statutes. *Oakland County Bd of Co Rd Comm'rs v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998). The primary goal of judicial interpretation of statutes is to ascertain and give effect to the Legislature's intent. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). If the plain and ordinary meaning of a statute is clear, judicial construction is neither necessary nor permitted. *Cherry Growers, Inc v Agricultural Marketing and Bargaining Bd*, 240 Mich App 153, 166; 610 NW2d 613 (2000). We may not speculate as to the probable intent of the Legislature beyond the words expressed in the statute. *In re Schnell*, 214 Mich App 304, 310; 543 NW2d 11 (1995). When reasonable minds may differ as to the meaning of a statute, the courts must look to the object of the statute, the harm it is designed to remedy, and apply a reasonable construction which best accomplishes the statute's purpose. *Marquis v Hartford Accident & Indemnity*, 444 Mich 638, 644; 513 NW2d 799 (1994).

Section 5 of the UCPA provides that a condemnation complaint "shall ask that the court ascertain and determine just compensation to be made for the acquisition of the [condemned] property." MCL 213.55(1); MSA 8.265(5)(1). However, the UCPA provides very little guidance regarding the factors a court should consider when

called upon to determine just compensation. See MCL 213.70 and 213.73; MSA 8.265(20) and 8.265(23).[8] Courts have generally been constrained only by the requirement that the property owner be placed in as good a condition as the owner would have been had no taking occurred. *Britton Trust, supra.*

Whether environmental contamination and cleanup costs associated with such contamination can be considered in determining just compensation in a condemnation proceeding is an issue of first impression in Michigan. When the UCPA was enacted in 1980, it was silent with respect to the prospect that property acquired through the exercise of eminent domain could be affected by environmental contamination. Since the enactment of the UCPA, courts throughout Michigan and across the country have been inundated with litigation arising from state and federal legislation addressing environmental contamination and recovery of costs associated with environmental cleanup. The Michigan Legislature amended the UCPA in 1993 to incorporate procedures addressing the potential of liability arising from cleanup costs of property subject to acquisition through the exercise of eminent domain.

Section 5 was amended to require the condemning agency to either "reserve[ ] or waive[ ] its rights to bring

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[8] MCL 213.70; MSA 8.265(20) directs that any change in fair market value before the filing of a complaint that was due to the general knowledge of the imminence of acquisition by the agency must be disregarded. MCL 213.73; MSA 8.265(23) directs that enhancements to remaining portions of a condemned tract must be considered in determining just compensation. Neither circumstance is at issue in the present case.

federal or state cost recovery actions against the present owner of the property arising out of a release of hazardous substances at the property. . . . " MCL 213.55(1); MSA 8.265(5)(1), as amended by 1993 PA 308. Section 8 was amended to provide "if the agency reserves its rights to bring a state or federal cost recovery claim against an owner, under circumstances that the court considers just, the court may allow any portion of the money deposited pursuant to section 5 to remain in escrow as security for remediation costs of environmental contamination on the condemned parcel." MCL 213.58(1); MSA 8.265(8)(1), as amended by 1993 PA 308.[9]

We conclude the UCPA does not vest courts with the authority to account for estimated remediation costs of contaminated property when calculating the amount of just compensation due a property owner. This conclusion is premised on the plain language of the amendments to the UCPA. The amendment to section 5 requires the condemning agency to either waive or reserve its "rights to bring federal or state cost recovery actions. . . . " The amendment to section 8 vests the court with the authority to protect the condemning agency should it prevail in a cost recovery action by allowing "any portion of the money deposited . . . to remain in escrow as security. . . . " This language supports the conclusion that any form of cost recovery arising from environmental contamination is to

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[9] In 1996, this provision was amended further. This case is governed by the pre-1996 amendments. We note, however, that the 1996 amendment did not substantially change the provisions at issue in this case. See MCL 213.58(2); MSA 8.265(8)(2), as amended by 1996 PA 474.

be pursued in a separate cause of action. There would be no purpose to these amendments if a court, in the process of determining just compensation, could simply deduct remediation costs from the fair market value of the condemned property.

The error in deducting environmental cleanup costs when determining just compensation is evident given that the amendments to the UCPA direct that liability for such costs be determined by way of a separate cause of action. The UCPA simply does not provide a basis for recovering remediation costs. The UCPA only provides the procedures by which an agency may reserve its rights to a cost recovery action and procedures by which a trial court may withhold funds pending resolution of such an action. An agency must bring a separate cause of action under state or federal law to establish liability for remediation costs. By deducting estimated cleanup costs from a parcel's value in determining just compensation for a taking, a court circumvents any defense a landowner might have to liability for such costs. As in this case where the parties stipulated that the environmental contamination was present on Old South Field when Extrusions purchased the land, the inequity of deducting such costs before any determination of the landowner's liability is clear.[10] See *W R Associates of Norwalk v Comm of Transportation*, 46 Conn Supp 355, 360; 751 A2d 859 (1999); *Northeast*

[10] The inequity is especially evident in this case where the Drain District admits it chose not to incur the cost of attempting to prove Extrusions' liability for the contamination and unequivocally stated it did not intend to bring a cost recovery action against Extrusions. See *supra*, n 4 and 5.

Economic Alliance, Inc v ATC Partnership, __ Conn Super Ct ___; ___ A2d ____ 1998 WL 197632, pp 6-7; *Dep't of Transportation v Parr*, 259 Ill App3d 602, 606-607; 633 NE2d 19 (1994).

Our holding is not affected by the fact that the 1993 amendment to subsection 8(1) of the UCPA also provides "[n]othing contained in this subsection is intended to limit or expand an owner's or agency's rights to bring federal or state cost recovery claims." MCL 213.58(1); MSA 8.265(8)(1), as amended by 1993 PA 308.[11] By its express terms, this limitation relates only to subsection 8(1), which addresses the court's ability to maintain in escrow estimated remediation costs. The above-quoted language does not apply to section 5, which expressly requires the condemning agency to either reserve or waive its rights to pursue cost recovery litigation in a separate proceeding. Moreover, this provision preserves the litigants' right to pursue separate cost recovery actions. Thus, it is consistent with our overall interpretation of the UCPA.

Precluding the consideration of remediation costs when determining just compensation is also consistent with the traditional notion that the land owner should be placed in as good a condition as it would have been had the taking not occurred. *Britton Trust, supra*. The "normal method for determining a condemnation award is to use the market value of the property." *Highway Comm v Gaffield*, 108 Mich App 88, 93; 310 NW2d 281 (1981), citing *In re Grand Haven Highway*, 357 Mich 20; 97 NW2d 748 (1959). The mere fact that a property is contaminated

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[11] See *supra*, n 9.

provides no significant assistance in determining its fair market value. While the fear of liability arising from environmental contamination may render a property nontransferable, it certainly does not render it valueless. Contaminated properties are like snow flakes; no two are alike. Thus, it is virtually impossible to find a comparable parcel of property on which to base an estimation of value. For this very reason, the Iowa Supreme Court found it appropriate to separate just compensation proceedings from environmental liability determinations. *Alladin, Inc v Black Hawk Co*, 562 NW2d 608, 616 (Iowa, 1997); see also *Parr, supra* at 605.

Determining fair market value of a contaminated property is not as simple as deducting the estimated costs of remediation. The cost of cleanup relates in large part to the extent of the contamination and the future use of the property. The cost to make the property suitable for service as a storm water detention pond may exponentially exceed the cost of cleanup to use the property for other purposes. This fact is recognized in the UCPA, which pursuant to section 8 only allows the court the authority to hold in escrow the "likely costs of remediation if the property were used for its highest and best use." MCL 213.58(2); MSA 8.265(8)(2), as amended by 1996 PA 474; MCL 213.58(1); MSA 8.265(8)(1), as amended by 1993 PA 308. Thus, it is clear that the only proper method of arriving at just compensation is to separate the question of just compensation from the question of liability for environmental cleanup.[12] This approach is consistent with the

[12] There is a split of authority among courts from other states that have addressed this question. Some courts have concluded that

(Continued on following page)

Uniform Standards of Professional Appraisal Practice, which rely on the notion that "value of an interest in impacted or contaminated real estate may not be measured by simply deducting the remediation or compliance cost estimate from the estimated value as if unaffected. . . . " See *Northeast Economic, supra* at 11, quoting Advisory Opinion AO-9 on which the Uniform Standards of Professional Appraisal Practice are, in part, based.

Given that the UCPA does not vest courts with the authority to account for estimated remediation costs when calculating just compensation, the trial court erred in the present case when it deducted estimated cleanup costs to arrive at a fair market value and just compensation amount. Accordingly, we reverse the trial court's ruling that $41,032 constitutes just compensation for the property.

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evidence of contamination should not be considered in just compensation proceedings. *W R Associates, supra; Northeast Economic, supra; Alladin, supra* at 615-616; *Parr, supra* at 607-608. Other courts have concluded that evidence of contamination is relevant to market value in eminent domain proceedings. *Finklestein v Dep't of Transportation*, 656 So2d 921, 922 (Fla, 1995); *Stafford v Bryan Co Bd of Education*, 219 Ga App 750, 752; 466 SE2d 637 (1995), rev'd on other grounds 267 Ga 274; 476 SE2d 727 (1996); *Tennessee v Brandon*, 898 SW2d 224, 227 (Tenn, 1994); *Olathe v Stott*, 253 Kan 687, 689-690; 861 P2d 1287 (1993); *Redevelopment Agency of Pamona v Thrifty Oil Co*, 4 Cal App 4th 469, 474; 5 Cal Rptr 2d 687 (1992); *Dep't of Health v Hecla Mining Co*, 781 P2d 122, 126 (Colo, 1989). Significantly, none of these jurisdictions' condemnation statutes contain provisions that may be construed to preclude consideration of environmental remediation costs in determining just compensation. As discussed *supra*, the 1993 amendments to Michigan's UCPA establish that liability for remediation costs is to be determined in separate cost recovery proceedings.

B. Did the trial court err in its determination of fair market value without regard to environmental cleanup costs?

Extrusions argues the trial court erred in finding that the value of Old South Field without consideration of environmental contamination was $278,800. A trial court's findings of fact may not be set aside unless clearly erroneous. MCR 2.613(C). A finding is clearly erroneous when although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Meek v Dep't of Transportation*, 240 Mich App 105, 115; 610 NW2d 250 (2000).

The Drain District's expert appraiser opined the value of Old South Field on the date of the taking was $211,300. An appraiser employed by Extrusions concluded the value was $346,300. The trial court averaged those appraisals and found the value of the land at the time of the taking without consideration of cleanup costs was $278,800. The court noted that amount was relatively consistent with the 1993 assessed value of the land, which rendered an actual cash value of $264,600. On appeal, Extrusions claims the court clearly erred in determining the value of the property because the taking occurred in 1994 and the 1993 assessed value was not an accurate indication of value. From the percent increase of the actual cash value of the property from 1991 to 1993, Extrusions extrapolates that the actual cash value of the property in 1994 was no less than $309,497. Assuming, without deciding, that the value of the property in 1994 was $309,497, we find no error. The court did not use the 1993 value in its calculation of value, but instead, merely compared it to the average of the two appraisals. The parties presented evidence supporting their appraisers' determinations and the amount

that the court determined to be the value of the property falls between the 1993 actual cash value and Extrusions' calculation of the 1994 cash value. Under these circumstances, we cannot say the court clearly erred in finding that the value of Old South Field at the time of the taking without consideration of environmental cleanup costs was $278,800.

C. Did the trial court err in failing to consider the affect of the condemnation of the Old South Field on the North Complex?

Extrusions also argues that the trial court clearly erred in finding that the taking did not cause damage to its North Complex. Extrusions claims it could have used Old South Field to build additional warehouse facilities or to add parking spaces.

Our Supreme Court has stated that the [sic] when a partial taking occurs:

> The measure of damages is the injury done to the fair market value of the entire tract by the taking of only a part. In other words the owner is entitled to recover the difference between the market value of the entire tract before the taking and the market value of what is left after the taking. [*State Highway Comm'r v Walma*, 369 Mich 687, 690; 120 NW2d 833 (1963).]

The evidence presented at trial established that at the time of the taking, Old South Field was an environmentally contaminated, vacant plot that was not properly graded for construction. Evidence suggested Extrusions was operating with sufficient warehouse and parking facilities on or near the North Complex. Extrusions does

not contest the trial court's finding that its business operations on the North Complex have been unaffected by the taking of Old South Field. Under these circumstances, we cannot say the trial court clearly erred when it found the fair market value of the North Complex was not affected by the taking of Old South Field.

III CONCLUSION

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Michael R. Smolenski
/s/ Jeffrey G. Collins

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

* * * * * * * * * * * * * *

SILVER CREEK DRAIN DISTRICT, a statutory body corporate,

Plaintiff,

v Case No. 94-2550-CC

EXTRUSIONS DIVISION, INC., a Michigan corporation,

Defendant. /

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I STIPULATED FACTS

By written stipulation entered into by and between the parties on September 20, 1997, and accepted by the Court, the following facts are deemed as established:

1. The real property at issue in this consolidated action, commonly known as "the Old South Field", is located at 1551 Madison in Grand Rapids, Michigan. The Old South Field is south of Cottage Grove and bounded on the east by Madison Street and on the west by Jefferson. The Old South Field is approximately 8 acres in size and is zoned for light industrial use. Its legal description is:

> E 1/2NW 1/4 SECTION 6, T6N, R11W, City of Grand Rapids, Kent County, lying south of Cottage Grove Street.

2. Extrusions Divisions, Inc. ("Extrusions Division") purchased the Old South Field in 1982 from Kysor Industrial Corporation in order to eventually construct additional buildings suitable for storage, office facilities and light manufacturing. Extrusions Division operates out of a building complex located on directly-adjoining property. Extrusions Division purchased this property for purposes of expansion.

3. Extrusions Division acquired the Old South Field after some alleged hazardous substances were disposed of or placed on the Old South Field.

4. In 1982, Extrusions Division conducted all appropriate inquiry into the previous ownership and uses of the Old South Field consistent with good commercial or customary practice. In 1982, it was not customary practice in industrial real estate sales to determine the prior owners of the parcel and the uses to which those owners put the parcel in order to determine whether there was any environmental contamination or potential contamination.

5. In late 1991, Extrusions Division began developing plans to expand its manufacturing and storage facilities on the Old South Field.

6. In early 1992, Extrusions Division began the process of obtaining a building permit from the city of Grand Rapids for a storage facility on the Old South Field to expand its facilities. Extrusions Division did not complete the building permit process.

7. The Old South Field was vacant at the time Extrusions Division purchased it. Other than to construct a fence around the perimeter, Extrusions Division did nothing with the Old South Field. It remained vacant and

unimproved until the Silver Creek Drain District acquired it through these condemnation proceedings.

8. The Silver Creek Drain District condemned the Old South Field through a Declaration of Taking dated June 29, 1994. It filed this condemnation action on June 29, 1994.

9. The Silver Creek Drain District made an Offer of Just Compensation for the Old South Field in the amount of $211,300.

10. The Old South Field was transferred to the Silver Creek Drain District as a result of this condemnation action and pursuant to this Court's order dated February 20, 1995.

11. The Silver Creek Drain District paid the amount they state is just compensation in November or December 1995.

12. At the time the Silver Creek Drain District condemned the Old South Field, Extrusions Division owned parcels 002 and 004 and a land contract was entered into between EMA and Extrusions Division on October 15, 1981 for parcel 003.

13. In 1989 and 1990, Extrusions Division appealed the SEV on the Old South Field and parcel 002, and submitted documents challenging the SEV for those years.

II FINDINGS OF FACT

Following the taking of testimony and presentation of proofs on September 22, 23, 24, and 25, 1997, the Court, based upon the testimony and exhibits received at trial, the pleadings, briefs and proposed findings of fact submitted by the parties, makes the following findings of fact pursuant to MCR 2.517. Any findings of fact which contain conclusions of law should be considered as such.

1. Extrusions Division purchased the Old South Field in 1982 for $106,000.

2. In 1989, the Grand Rapids City Assessor placed an assessed value of $124,000 (actual cash value $248,000) on the Old South Field. On appeal by Extrusions Division, the Board of Review reduced the assessed value to $115,000 (actual cash value $230,000).

3. Extrusions Division pursued a further appeal to the Michigan Tax Tribunal, supported by the appraisal of Russell J. Mackie, of Poppen and Mackie, Inc. (Exhibit 6) showing the actual cash value of Old South Field to be $87,000. This figure was based upon a parcel value of $207,796, minus the $127,033 estimated as being necessary to partially fill the eastern and western portions of the parcel to street grade level so as to make the site suitable for building. The appeal was resolved by written stipulation between Extrusions Division and the city of Grand Rapids, dated January 8, 1991, which established an assessed value of $86,500 (actual cash value $173,000) for 1989 and 1990.

4. The 1993 assessed value of Old South Field was $132,300 (actual cash value $264,600).

5. The Old South Field was appraised at $211,300 by Charles Jakems of Jakems Appraisal Company, Grand Rapids, and at $346,300 by William F. Schnepf, Jr. of All Appraisals, Inc., Angola, Indiana, as of June 29, 1994. The average of these figures, $278,800, appears consistent with the evidence adduced at trial, and the 1993 assessed value of the property.

6. At the time of the taking, Old South Field was an environmentally contaminated site, with respect to which a reasonably prudent purchaser would have required, at a

minimum, a formal Type-C Closure from the DNR as a condition precedent to closing. The cost of remediation necessary to secure such a formal Type-C Closure was estimated at $272,560 by Barbara Marczak, PE, of Prein and Newhof, and $202,976 by Marc Groenleer, PE, NTH Consultants. The average of these figures, $237,768, seems reasonable and consistent with the evidence as developed at trial.

7. Extrusions Division's plans for Old South Field were to build one or more storage facilities on it, although no determination had been made as to what would be stored there. The Extrusions Division "North Complex", located across Cottage Grove Street from Old South Field, contains 15,145 square feet of manufacturing space and 53,199 square feet of storage space.

8. Extrusions Division appears to have adequate storage space available, and has failed to establish that expenses it has incurred for off-premises storage are causually related to the taking of Old South Field. Extrusions Division rents out 9,000 of its 53,199 square feet of storage space to Raven R & J Corporation for $.56 per square foot, and makes an additional, undetermined number of square feet available to its owner and others for the storage of non-business related personal property, including collector-quality automobiles, automobile parts, boats and kitchen equipment. Nevertheless, Extrusions Division itself rents 20,000 square feet of storage area at $3 per square foot from Bomarko, Inc., which is partly owned by the sole owner of Extrusions Division.

9. Extrusions Division has suffered no "functional obsolescence" due to a real or perceived "parking space deficiency". Current operations are not hampered by the loss

of any ad hoc parking capacity along the edge of Old South Field. Potential expansion of the "North Complex" is not inhibited by the loss of potential parking in Old South Field because the "North Complex" is already built out virtually to the property lines and cannot expand further in any event. If, as calculated by Mr. Schnepf, a maximum of 26 parking spaces are needed for the "North Complex", they could be accommodated in a 6,630 square foot lot. At the $1 per square foot purchase price Mr. Schnepf attaches to Old South Field, such a lot could be acquired for $6,630.

10. The taking of Old South Field had no immediate impact on the other properties owned by Extrusions Division, and Extrusions Division continues to operate today just as it did the day before the taking occurred.

III CONCLUSIONS OF LAW

Pursuant to MCR 2.517, the Court reaches the following conclusions of law. Any conclusions of law which contain findings of fact should be considered as such.

1. This Court has jurisdiction over the parties. The subject matter of this lawsuit is within the Court's jurisdiction pursuant to MCL 600.605: MSA 27A.605 and MCL 213.52; MSA 8.265(2).

2. The Silver Creek Drain District cannot take the Old South Field for public use without providing just compensation to Extrusions Division. Just compensation must put Extrusions Division in as good a condition as it would have been if the Old South Field had not been taken. Mich Const 1963, Art X, § 2; *In re Widening of Gratiot Avenue*, 294 Mich 569; 293 NW 755 (1940); *Chicago & Grand Trunk Ry Co v Hough*, 61 Mich 507; 28 NW 532 (1886).

3. Determining damages in condemnation proceedings is not a matter of formula or artificial rules. Instead, it is a matter of sound judgment and discretion based upon a consideration of all relevant facts in a particular case. *In re Grand Haven Hwy*, 357 Mich 20, 28-29; 97 NW2d 748 (1959).

4. If the Old South Field constitutes a separate tract of land unto itself, then its condemnation by Silver Creek Drain District was a "total" taking, and compensation is based upon the fair market value of that tract alone. If, however, Old South Field and parcels 002, 003 and 004 together constitute a single tract, then this condemnation of Old South Field is a "partial" taking and compensation is based on the fair market value of the property taken and the damage, if any, to the remainder.

5. The parcels in question constitute a single tract because they meet the operative three-part test: 1) uniformity of ownership in the property; 2) unity of use; and 3) contiguity. *State Highway Commissioner v Englebrecht*, 2 Mich App 572, 574; 140 NW2d 781 (1966):

> a. Although there are numerous discrepancies and irregularities about Extrusions Division's unrecorded land contract vendee's interest in parcel 003, it appears that there is uniformity of ownership of the parcels in question by Extrusions Division.
>
> b. Whether vacant, unused property held for possible future expansion can meet the "unity of use" part of the test appears to be a question of first impression in Michigan. Courts in other jurisdictions are split on the question. Contrast *City of Chicago v Equitable Life Assurance Society of the United States*, 8 Ill 2d 341; 134 NE2d 296 (1956) with *Valley Paper Co. v Holyoke Housing*

Authority, 346 Mass 561; 194 NE2d 700 (1963). Acknowledging the closeness of the question, the Court concludes that Extrusions Division does meet the "unity of use" test by its acquisition and holding of the Old South Field for future expansion purposes.

c. While some authorities hold that the "contiguity" part of the test is not met if parcels are separated by a public street, see, e.g., *City of Chicago v Equitable Life Assurance Society of the United States, supra*, and this appears to be an unsettled question in Michigan jurisprudence, the Court concludes that the Old South Field is "contiguous" with the Extrusions Division owned parcels 003 and 004, which are separated from it by Cottage Grove Street.

6. While Extrusions Division is therefore entitled to recover damages based upon the value of the property taken and the damage the taking caused to the remaining property, *State Highway Commissioner v Walma*, 369 Mich 687, 690; 120 NW2d 833 (1963), the Court finds no credible evidence that the taking caused any damage to the remaining property owned by Extrusions Division.

7. The assessed valuation of real estate has a material bearing on the issue of the fair market value of the property, *In Re Memorial Hall Site*, 316 Mich 360, 362; 25 NW2d 516 (1947), and the Court determines that the average of the Jakems and Schnepf appraisals, $278,800, which is reasonably consistent with a 1993 assessed value of $132,300 (actual cash value of $264,600), is the fair market value of the Old South Field, if environmentally "clean", on June 29, 1994.

8. Whether Extrusions Division would be legally liable for environmental cleanup of the Old South Field is irrelevant because this is not a DEQ enforcement action pursuant to the Michigan Environmental Response Act ("MERA"), MCL 299.612(1); MSA 13.32(12)(1) [repealed by 1994 PA 451, effective March 30, 1995] or the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 USC 9607(a), and, as indicated in Finding of Fact #6 above, a reasonably prudent purchaser of Old South Field on June 29, 1994 would have required, at a minimum, a formal Type-C Closure letter from the DNR as a condition precedent to closing on the property.

9. As indicated in Finding of Fact #6 above, the Court finds that the reasonable cost of securing such a formal Type-C clearance would be $237,768 which, when deducted from $278,800 leaves a net fair market value of $41,032 for Old South Field as of June 29, 1994.

10. Therefore, the Court finds that the just compensation for the taking of Old South Field on June 29, 1994 is $41,032.

A judgment will enter accordingly.

/s/
DONALD A. JOHNSTON,
Circuit Judge

DATED: November 6, 1997
at Grand Rapids, Michigan

cc: Jeffrey S. Crampton
Peter R. Tolley

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF KENT

SILVER CREEK DRAIN DISTRICT, a statutory body corporate,

Plaintiff,

vs.

EXTRUSIONS DIVISION, INC., a Michigan corporation and AZZAR STORE EQUIPMENT, INC., a Michigan corporation

Defendants. /

Case No. 94-2550-CC

Hon. Donald A. Johnston

Consolidated With

EXTRUSIONS DIVISION, INC., a Michigan corporation,

Plaintiff,

vs.

CITY OF GRAND RAPIDS, a municipal corporation, and KENT COUNTY DRAIN COMMISSIONER, jointly and severally,

Defendants. /

Case No. 92-78727-CZ

Hon. Donald A. Johnston

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ORDER

At a session of said Court held at the Hall of Justice, City of Grand Rapids, Michigan, this ___ day of JAN - 6 1998, 199___.

In accordance with the Findings of Fact and Conclusions of Law as set forth in this Court's Opinion dated November 6, 1997 in this consolidated action (Kent County Circuit Court case nos. 92-78727-CZ and 94-2550-CC).

IT IS ORDERED that Extrusions Division, Inc. is entitled to keep all amounts previously paid to it by the Silver Creek Drain District during the pendency of this litigation;

IT IS FURTHER ORDERED that the issue concerning the date of the taking of the property is dismissed as moot;

IT IS FURTHER ORDERED that all other claims and issues in these consolidated cases are dismissed without prejudice; and

IT IS FURTHER ORDERED that this Order shall constitute a final judgment of these consolidated cases pursuant to MCR2.604

IT IS SO ORDERED.

/s/
Hon. Donald A. Johnston,
Circuit Judge

Approved as to form:

VARNUM, RIDDERING, SCHMIDT & HOWLETT

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Attest: A True Copy

Clerk

Order
Entered: July 31, 2003

Michigan Supreme Court
Lansing Michigan

Maura D. Corrigan,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman
Justices

Rehearing No. 489

119721

SILVER CREEK DRAIN DISTRICT,

Plaintiff-Appellant,

v.

EXTRUSIONS DIVISION, INC. and AZZAR STORE EQUIPMENT, INC.,

Defendants-Appellees.

SC: 119721
COA: 216182
Kent CC: 94-002550-CC

In this cause, a motion for rehearing is considered and it is DENIED.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the court.

July 31, 2003

/s/
Corbin Davis Clerk

PUBLIC ACT NO. 308

H.B. No. 4719
PROPERTY – CONDEMNATION –
JUST COMPENSATION, COST RECOVERY CLAIM

AN ACT to amend sections 5, 7, 8, and 9 of Act No. 87 of the Public Acts of 1980, entitled as amended "An act to provide procedures for the condemnation, acquisition, or exercise of eminent domain of real or personal property by public agencies or private agencies; to provide for an agency's entry upon land for certain purposes; to provide for damages; to prescribe remedies; and to repeal certain acts and parts of acts," section 5 as amended by Act No. 68 of the Public Acts of 1985, being sections 213.55, 213.57, 213.58, and 213.59 of the Michigan Compiled Laws; and to add section 6a.

The People of the State of Michigan enact:

Section 1. Sections 5, 7, 8, and 9 of Act No. 87 of the Public Acts of 1980, section 5 as amended by Act No. 68 of the Public Acts of 1985, being sections 213.55, 213.57, 213.58, and 213.59 of the Michigan Compiled Laws, are amended and section 6a is added to read as follows:

M.C.L.A. §213.55

Sec. 5. (1) Except as provided in section 25(4),[1] before initiating negotiations for the purchase of property, the agency shall establish an amount which it believes to be just compensation for the property and promptly shall submit to the owner a good faith offer to acquire the property for the full amount so established. The good faith offer shall state whether the agency reserves or waives its rights to bring federal or state cost recovery actions

against the present owner of the property arising out of a release of hazardous substances at the property and the agency's appraisal of just compensation for the property shall reflect such reservation or waiver. The amount shall not be less than the agency's appraisal of just compensation for the property. The agency shall provide the owner of the property and the owner's attorney with an opportunity to review the written appraisal, if an appraisal has been prepared, or if an appraisal has not been prepared, the agency shall provide the owner or the owner's attorney with a written statement and summary, showing the basis for the amount the agency established as just compensation for the property. If an agency is unable to agree with the owner for the purchase of the property, after making a good faith written offer to purchase the property, the agency may file a complaint for the acquisition of the property in the circuit court in the county in which the property is located. If a parcel of property is situated in 2 or more counties and an owner resides in 1 of the counties, the complaint shall be filed in the county in which the owner is a resident. If a parcel of property is situated in 2 or more counties and an owner does not reside in 1 of the counties, the complaint shall be filed in any of the counties in which the property is situated. The complaint shall ask that the court ascertain and determine just compensation to be made for the acquisition of the described property. If an agency has made a good faith offer pursuant to this section prior to the effective date of section 6a[2] but has not filed a complaint for acquisition of the property, the agency may withdraw the original offer and resubmit a good faith offer that complies with this act as amended by the amendatory act that added section 6a. If a good faith offer is resubmitted pursuant to this subsection, attorney fees

under section 16[3] shall be based on the resubmitted good faith offer.

(2) In addition to other allegations required or permitted by law, the complaint shall contain or have annexed to it all of the following:

(a) A plan showing the property to be taken.

(b) A statement of purpose for which the property is being acquired, and a request for other relief to which the agency is entitled by law.

(c) The name of each known owner of the property being taken.

(d) A statement setting forth the time within which motions for review under section 6[4] shall be filed; the amount which will be awarded and the persons to whom the amount will be paid in the event of a default; and the deposit and escrow arrangements made pursuant to subsection (3).

(e) A declaration signed by an authorized official of the agency declaring that the property is being taken by the agency. The declaration shall be recorded with the register of deeds of each county within which the property is situated. The declaration shall include:

(i) A description of the property to be acquired sufficient for its identification and the name of each known owner.

(ii) A statement of the estate or interest in the property being taken. Fluid mineral and gas rights and rights of access to and over the highway are considered excluded from the rights acquired unless the rights are specifically included.

(iii) A statement of the sum of money estimated by the agency to be just compensation for each parcel of property being acquired.

(iv) Whether the agency reserves or waives its rights to bring federal or state cost recovery actions against the present owner of the property.

(3) At the time the complaint is filed, the agency shall deposit the amount estimated to be just compensation with a bank, trust company, or title company in the business of handling real estate escrows, or with the state treasurer, municipal treasurer, or county treasurer. The deposit shall be set aside and held for the benefit of the owners, to be disbursed upon order of the court as provided in section 8.[5]

[1] Section 213.75(4).

[2] Section 213.56a.

[3] Section 213.66.

[4] Section 213.56.

[5] Section 213.58.

M.C.L.A. § 213.56a

Sec. 6a. (1) If an agency elects to reserve its rights to bring a state or federal cost recovery claim against an owner, the court upon motion of the owner, which must be filed within the time prescribed to responsively plead after service of a complaint, may reverse that election and order the agency to waive its claims, if the owner establishes by affidavit, and after an evidentiary hearing if requested by the agency in the time prescribed to provide an answer to

a motion, 1 or more of the following circumstances exist with respect to the property:

(a) The property is a single family residence and has been used solely for residential purposes.

(b) The property is "agricultural property" as defined in section 3 of the environmental response act, Act No. 307 of the Public Acts of 1982, being section 299.603 of the Michigan Compiled Laws, and the reservation of rights arises out of a release of hazardous substances caused by the application of a fertilizer, soil conditioner, agronomically applied manure, or a pesticide or a combination of these substances according to label directions and according to generally accepted agricultural and management practices, as defined by the Michigan right to farm act, Act No. 93 of the Public Acts of 1981, being sections 286.471 to 286.474 of the Michigan Compiled Laws.

(c) The owner is the only identified potentially responsible party, the extent of contamination and cost of remediation has been reasonably quantified, and the estimated cost of remediation does not exceed the agency's appraised value of the property.

(2) If the court reverses the agency's election of reservation of rights under subsection (1), the agency shall submit to the owner a revised good faith offer. The revised good faith offer shall be considered the good faith offer for purposes of sections 5 and 16.[1]

(3) An agency and an owner may stipulate that the agency will reverse its election and waive its rights to bring a state or federal cost recovery claim against an owner.

[1] Sections 213.55 and 213.66.

M.C.L.A. § 213.57

Sec. 7. (1) If a motion to review necessity is not filed within the time specified in section 6,[1] the title to the property described in the petition shall vest in the agency as of the date on which the complaint was filed. The right to just compensation shall then vest in the persons entitled to the compensation and be secured as provided in this act. Title to the property shall also vest in the agency, as provided in this act, if the motion to review necessity is denied after a hearing and after any further right to appeal has terminated. (2) Neither a motion filed pursuant to section 6a,[2] challenging the agency's decision to reserve its rights to bring federal or state cost recovery actions nor a motion challenging the agency's escrow under section 8[3] shall delay vesting of title in the agency.

[1] Section 213.56.

[2] Section 213.56a.

[3] Section 213.58.

M.C.L.A. § 213.58

Sec. 8. (1) Except as provided in subsection (3), if a motion for review as provided in section 6[1] is not filed or is denied and the right to appeal has terminated or if interim possession is granted pursuant to section 9,[2] the court shall order the escrowee to pay the money deposited pursuant to section 5,[3] for or on account of the just compensation that may be awarded pursuant to section 13.[4] However, if the agency reserves its rights to bring a state or federal cost recovery claim against an owner, under circumstances that the court considers just, the court may

allow any portion of the money deposited pursuant to section 5 to remain in escrow as security for remediation costs of environmental contamination on the condemned parcel. An agency shall present an affidavit and environmental report establishing that the funds placed on deposit pursuant to section 5 are likely to be required to remediate the property. The amount in escrow shall not exceed the likely costs of remediation if the property were used for its highest and best use. Nothing contained in this subsection is intended to limit or expand an owner's or agency's rights to bring federal or state cost recovery claims. Except as provided in subsection (2), upon the motion of any party, the court shall apportion the estimated compensation among the claimants to the compensation.

(2) Notwithstanding any order entered by the court requiring money deposited pursuant to section 5 to remain in escrow for the payment of estimated remediation costs of contaminated property, the funds in escrow, plus interest, shall be released among the claimants to the just compensation under circumstances that the court considers just, including any of the following circumstances:

(a) The court finds that the applicable statutory requirements for remediation have changed and the amount remaining in escrow is no longer required in full or in part to remediate the alleged environmental contamination.

(b) The court finds that the anticipated need for the remediation of the alleged environmental contamination is not required or is not required to the extent of the funds remaining on deposit.

(c) If the remediation of the property is not initiated by the agency within 2 years of surrender of

possession pursuant to section 9 and the agency is unable to show good cause for delay.

(d) The costs actually expended for remediation are less than the estimated costs of remediation or less than the amount of money remaining in escrow.

(e) A court issues an order of apportionment of remediation responsibility.

(3) If the court orders the agency to reverse its election under section 6a(1),[5] the court shall order the escrowee to pay the amount of the revised good faith offer for or on account of the just compensation that may be awarded pursuant to section 13, and to pay the balance of the escrow to the agency. If the agency seeks possession before the court decides whether to reverse the agency's election or before submitting a revised good faith offer, the agency may request that the court order a portion of the escrow withheld in anticipation of a reduction in the revised good faith offer, with the balance to be paid by the escrowee for or on account of the just compensation that may be awarded pursuant to section 13. If the court denies the request to reverse the agency's election or when the revised good faith offer is submitted, the court shall order the escrowee to pay any unpaid portion of it for or on account of the owner and to pay any balance to the agency.

[1] Section 213.56.

[2] Section 213.59.

[3] Section 213.55.

[4] Section 213.63.

[5] Section 213.56a(1).

M.C.L.A. § 213.59

Sec. 9. (1) Upon filing of a complaint and making the deposit as provided in section 5[1] and after opportunity is given for a person to file a motion for review under section 6[2] or, if motion for review is filed, upon final determination of the motion, the court shall fix the time and terms for surrender of possession of the property to the agency and enforce surrender by appropriate order or other process. The court also may require surrender of possession of the property after the motion for review filed under section 6 has been heard, determined and denied by the circuit court, but before a final determination on appeal, if the agency demonstrates a reasonable need.

(2) If interim possession is granted to a private agency, the court, upon motion of the owner, may order the private agency to file an indemnity bond in an amount determined by the court as necessary to adequately secure just compensation to the owner for the property taken.

(3) If an order granting interim possession is entered, an appeal from the order or any other part of the proceedings shall not act as a stay of the possession order. An agency shall be liable for damages caused by the possession if its right to possession is denied by the trial court or on appeal.

(4) Repayment of all sums advanced shall be a condition precedent to entry of a final order setting aside a determination of public necessity.

(5) Neither a motion filed pursuant to section 6a,[3] challenging the agency's decision to reserve its rights to bring federal or state cost recovery actions, nor a motion challenging the agency's escrow under section 8,[4] shall

delay the vesting of possession in the agency provided that the court shall not order possession surrendered to the agency before it orders that the escrow be distributed as provided in section 8(1) or (3).[5]

[1] Section 213.55.

[2] Section 213.56.

[3] Section 213.56a.

[4] Section 213.58.

[5] Section 213.58(1) or 213.58(3).

M.C.L.A. § 213.55 Note

Section 2. This amendatory act shall take effect upon the expiration of 30 days after the date of its enactment.

This act is ordered to take immediate effect.

Approved December 24, 1993.

Filed December 28, 1993.

STATE OF MICHIGAN

THE 17TH CIRCUIT COURT FOR THE
COUNTY OF KENT

**SILVER CREEK
DRAIN DISTRICT,**

Plaintiff,

vs No. **92-78727-CZ**

**EXTRUSIONS DIVISION,
INC., et al.,**

Defendants.

_____/

BENCH TRIAL – VOLUME NO. I OF IV

BEFORE HONORABLE DONALD A. JOHNSTON,
CIRCUIT JUDGE

Grand Rapids, Michigan –
Monday, September 22, 1997

APPEARANCES:

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* * *

Trial Testimony of
Jerrold A. Shupe
September 22, 1997

* * *

[26] Q All right. Now, are these items, environmental contamination, removing concrete, bringing in fill, are these items that an assessor would have to take into account when valuing a property?

A Yes, he would.

Q All right. And, apparently, the Board of Review took that into account, because just past the environmental information is a – a letter reducing the assessed valuation on it by $9,000?

A That's correct.

* * *

HOUSE LEGISLATIVE ANALYSIS SECTION
Olds Plaza Building, 10th Floor
Lansing, Michigan 48909
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REVITALIZNG MICH. CITIES
House Bill 4719 (Substitute H-2)
Sponsor: Rep. Jan Dolan

First Analysis (6-16-93)
Committee: Conservation
Environment and Great Lakes Affairs

THE APPARENT PROBLEM:

The consequences of state and federal efforts to force polluters to clean up property that contains contaminated soil or groundwater has resulted, in many cases, in the abandonment of these sites. In some situations, sites are abandoned because the property owner fears exorbitant cleanup costs. In addition, many commercial lending institutions are wary of risking capital by lending money to locate businesses at sites where contamination has occurred, for fear of being held responsible for future cleanup costs. In other situations, government policies actually encourage and subsidize the development of undeveloped suburban areas to the detriment of older urban areas. The result in many cities is urban sprawl. "Urban sprawl" has been defined by an environmental regulation task force that was created in May, 1992, by the Southeast Michigan Council of Governments (SEMCOG), as "sprawling, low-density growth at the suburban fringe, and concurrent disinvestment and abandonment of older/urbanized communities."

SEMCOG collaborated with a citizen advisory group appointed in April, 1992, to study the impact of state environmental laws and policies on urban sprawl. The

advisory group's January, 1993, report, "Revitalizing Our Michigan Cities," recommended legislation that would assist older cities' efforts to redevelop idle contaminated industrial and commercial properties. A package of bills has been introduced to implement the group's recommendations, including House Bill 4718, which would permit an entity such as the state or a local governmental unit that is exempt from liability as an "operator" or "owner" of a contaminated site to transfer its exempt status to a subsequent purchaser or lessee; House Bill 4720, which would expand the types of projects and increase the amount of funds for contaminated properties owned by local governments that are eligible to receive funds under the Michigan Site Reclamation Program; and House Bill 4721, which would exclude some banks and lending institutions from liability for contamination on property on which they held a security interest. (For further information, see the analysis for House Bills 4718, 4720, and 4721 dated 6-10-93).

Another of the group's recommendations is to address the problem encountered by government entities seeking to exercise eminent domain through the use of condemnation authority: appraising a parcel of property as if it were not contaminated, without holding the property payment in escrow for later clean-up costs, could provide a windfall profit for a property owner or potentially responsible party (PRP) who has cleanup liability if the property is, in fact, contaminated. On the other hand, taking potential cleanup costs into consideration when appraising a property may generate a negative property value. Legislation has been introduced to take potential liability for cleanup costs into account by allowing a court to have a portion of the compensation amount offered for the property retained

in escrow, and to allow a public agency to reserve its right to bring cost recovery actions when offering compensation for property it seeks to "take over."

* * *

Supreme Court, U.S.
FILED
DEC 1 - 2003
OFFICE OF THE CLERK

No. 03-653

In The Supreme Court of the United States

EXTRUSIONS DIVISION, INC.,

Petitioner,

v.

SILVER CREEK DRAIN DISTRICT,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Michigan

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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THE PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

This matter has been consolidated with *Extrusions Division, Inc. v. City of Grand Rapids and Kent County Drain Commissioner*. The Respondents are governmental agencies, and, thus, no Supreme Court Rule 29.6 Disclosure is required.

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INTRODUCTION

Petitioner makes a basic assumption throughout its entire Petition for a Writ of Certiorari that is not accurate. The State of Michigan has never adopted an "exclusion" statute for determining "just compensation" when the condemned property is environmentally contaminated. This error by Petitioner is compounded by its argument that the Michigan Supreme Court made its determination based only on a Constitutional review, without doing any statutory analysis. The Michigan Supreme Court did, however, complete a detailed statutory interpretation process in this matter, and determined that the Michigan Legislature had not, in fact, adopted an "exclusion" approach to valuation in condemnation proceedings. This is a fatal flaw in Petitioner's analysis.

It is uniformly accepted that a condemnation proceeding is an *in rem* proceeding. Thus, the primary focus of all constitutional interpretations dealing with condemnation proceedings is to determine the value of the *rem*. Petitioner's entire analysis hinges upon condemnation proceedings being converted to *in personam* proceedings.

Finally, Petitioner simply overstates historic Constitutional analysis of this Court in assessing proceedings pursuant to the Fifth Amendment to the U.S. Constitution.

COUNTERSTATEMENT OF THE CASE

In its Statement of the Case, Petitioner assumes that the Amendments to the Michigan Uniform Condemnation

Proceedings Act ("U.C.P.A." throughout) that were enacted by the Michigan Legislature in 1993 create an "exclusion" statute. *See*, Petition for a Writ of Certiorari, at p. 3. This analysis is flawed, however, as it is exactly opposite of what the Michigan Supreme Court held in its Opinion. App. 1-21. This error is compounded in Petitioner's Statement of the Case, where Petitioner makes the following statement:

> In reaching its holding, the Michigan Supreme Court reasoned that it did not even need to engage in the exercise of statutory interpretation. Rather, the Michigan Supreme Court held that the Michigan Statute could not constitutionally require the exclusion of the effect of the contamination because to do so would remove a factor relevant to "market value."

See, Petition for a Writ of Certiorari, at pp. 13-14. This analysis of the Michigan Supreme Court's Opinion is erroneous.

The Michigan Supreme Court made it very clear that it must interpret the language of the statute in the U.C.P.A. *See*, Opinion, App. 6-7. The Michigan Supreme Court then spent a majority of its Opinion analyzing the U.C.P.A. in determining what the Michigan Legislature meant in the U.C.P.A. when the statute was adopted and amended. *See*, Opinion, App. 7-14.

The Michigan Supreme Court held that, since the legislature utilized the term "just compensation" when it unified all of the condemnation procedures in the U.C.P.A., the legislature must have intended those words to have the same meaning as the constitutional use of those words. *See*, Opinion, App. 6-7. The Michigan Supreme Court then

noted that the Fifth Amendment of the United States Constitution and "[e]very Michigan constitution has had a similar clause requiring just compensation in these circumstances." *See*, Opinion, App. 6. The Michigan Supreme Court then performed a delicate and intricate statutory interpretation analysis as to the meaning of "just compensation" in the U.C.P.A. *See*, Opinion, App. 7-14.

The Michigan Supreme Court first noted that the term "just compensation" in the U.C.P.A. must be given the same meaning as it is in the Constitution. *See*, Opinion, App. 7 (citation omitted). The Michigan Supreme Court then analyzed what "just compensation" meant pursuant to the Constitution.

The Michigan Supreme Court held that "just compensation" is a "technical legal term or a phrase of art in the law[.]" *See*, Opinion, App. 7, *quoting Michigan Coalition of State Employee Unions v. Civil Service Commission*, 465 Mich. 212, 222-223, 634 N.W.2d 692 (2001). Since the term "just compensation" is a "technical legal term," "the phrase will be given the meaning that those sophisticated in the law understood at the time of enactment unless it is clear from the constitutional language that some other meaning was intended." *Id.*, at Opinion, App. 7-8 (footnote omitted). Thus, the Michigan Supreme Court noted that, since the legislature used this "term of art" when it adopted and amended the U.C.P.A., the legislature meant it to be interpreted as that term had been interpreted when the constitutional language was adopted in 1963. *Id.*

The Michigan Supreme Court then completed a thorough analysis of state and federal constitutional law as it relates to the matters that are to be taken into consideration when determining "just compensation." *See*,

App. 9-11. The Michigan Supreme Court then determined that the term "just compensation"

> was a legal phrase of art in 1963 that meant, and still means, that the proper amount of compensation for property takes into account all factors relevant to market value. It is this meaning that the Constitutional drafters and ratifiers are held to have understood when they were adopting the Michigan Constitution of 1963, and a similar understanding is attributed to the legislators, who also used the phrase 'just compensation' when they enacted the UCPA in 1980.

See, Opinion, App. 11-12 (footnote omitted).

The Michigan Supreme Court then interpreted the amendments to the U.C.P.A. that were enacted in 1993 by the Michigan Legislature, and determined that those provisions, as written, could not be interpreted as suggested by Petitioner:

> That the Legislators who amended the UCPA in 1993 provided the procedures and means for securing remediation costs and dovetailed those with the just-compensation determination indicates no intent to abrogate the meaning of 'just compensation' established in our jurisprudence. Indeed, to attribute such an intent, i.e., the intent to diminish a constitutional standard by statute, is to place the legislators in the posture of acting unconstitutionally. This we avoid unless no other construction is possible and, as such, an alternate construction is possible, we adopt it.

See, Opinion, App. 12 (footnotes omitted).

Thus, the Michigan Supreme Court did, in fact, conduct an extensive statutory construction analysis in its

Opinion. For Petitioner to claim, as it has in its Petition for a Writ of Certiorari, that the "Michigan Supreme Court reasoned that it did not even need to engage in the exercise of statutory interpretation[,]" is, therefore, erroneous. *See*, Petition for a Writ of Certiorari, at 13.

ARGUMENT

I. PETITIONER HAS NOT SHOWN A COMPELLING REASON FOR REVIEW BECAUSE THE MICHIGAN SUPREME COURT HAS DETERMINED, BY STATUTORY CONSTRUCTION, THAT THE STATUTE RELIED UPON BY PETITIONER IS NOT, IN FACT, AN "EXCLUSION" STATUTE.

As noted in the Counterstatement of the Case, above, Petitioner's Statement of the Case incorrectly claims that the Michigan Supreme Court did not perform a statutory analysis of the 1993 amendment to the U.C.P.A. Petitioner's entire theory of the case is that the legislature adopted an "exclusion" statute by adopting the amendments to the U.C.P.A. in 1993, and that the Constitutional analysis by the Michigan Supreme Court runs contrary to the decisions of two other State Supreme Courts (Iowa and New Jersey), and thus creates a conflict worthy of review by this Court. *See*, Petition for a Writ of Certiorari, at 15-21.

As noted in the Counterstatement of the Case, however, Petitioner's analysis of the Michigan Supreme Court's decision is flawed. The Michigan Supreme Court merely interpreted the legislative intent when the Michigan Legislature amended the U.C.P.A. in 1993. It held, unequivocally, that when the Legislature utilized the term

"just compensation" in the amendments in adopting the U.C.P.A. in 1980, and amending it in 1993, it utilized a legal term of art, and that term of art must be given the same meaning as it was in 1963 when Michigan adopted its current Constitution. *See*, Opinion, App. 6-12. The crux of the analysis by the Michigan Supreme Court is that the legislature, in Michigan, used a legal term of art when it adopted the U.C.P.A., and amended it in 1993. By utilizing the term "just compensation," the legislature utilized a term that has specific, long analyzed meanings that must be interpreted consistently with those meanings. *See*, Opinion, App. 7-8, *citing*, *Michigan Coalition of State Employee Unions v. Civil Service Commission*, 465 Mich. 212, 222-223, 634 N.W.2d 692 (2001). The Michigan Supreme Court, in determining legislative intent, has consistently held that when the legislature uses a legal term of art that is contained in the Constitution, those meanings of these words will be the same as the Constitutional interpretation of those words, "unless it is clear . . . that some other meaning was intended." *Id.*, *quoting* *Michigan Coalition of State Employee Unions*, at 223.

The Michigan Supreme Court did not simply complete a constitutional analysis of whether an "exclusion" statute was or was not viable. The Michigan Supreme Court held that the Michigan Legislature, when it amended the U.C.P.A. in 1993, intended the words "just compensation" to have the same meaning as those terms did when the 1963 Michigan Constitution was adopted. *See*, Opinion, App. 8-13. The Michigan Supreme Court then determined the meaning of "just compensation" within those parameters, reviewing both state and federal constitutional law. *See*, Opinion, App. 8-12.

It is within these parameters that the Michigan Supreme Court held that there is no indication of "intent to abrogate the meaning of 'just compensation' established in our jurisprudence" when the legislature amended the U.C.P.A. in 1993. *See*, Opinion, App. 12. The Michigan Supreme Court interpreted the statutory language in such a fashion that it determined the legislative intent, and held, unequivocally, that the 1963 meaning of "just compensation" was the meaning intended by the legislature when it adopted the 1993 U.C.P.A. amendments. *Id.*

Thus, the petitioner's entire basis for this petition is erroneous. The Michigan Supreme Court did, in fact, conduct a detailed statutory interpretation. It held, unequivocally, that Michigan had not adopted an "exclusion" statute. This finding is consistent with U.S. Constitutional and Michigan Constitutional analysis. Thus, the Petition for a Writ of Certiorari should be denied.

II. PETITIONER HAS NOT SHOWN A COMPELLING REASON FOR REVIEW AS THE WELL-ESTABLISHED PRINCIPLE OF "JUST COMPENSATION" PURSUANT TO THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION FOCUSES ON "MARKET VALUE" IN CIRCUMSTANCES LIKE THIS.

It is a well-established principle that any evidence that affects the market value of a property is admissible for purposes of determining just compensation. *See e.g.*, *Searl v. Lake Co. School Dist. No. 2*, 133 U.S. 553, 564, 10 S. Ct. 374, 33 L. Ed. 740 (1890) (holding that a determination of just compensation must include "every . . . element entering into its cash or market value, as tested by its capacity for any and all uses. . . . "); *Seaboard*

A.L.R. Co. v. United States, 261 U.S. 299, 306, 43 S. Ct. 354, 67 L. Ed. 664 (1923) (holding that "[t]he requirement that 'just compensation' shall be paid is comprehensive and includes all elements. . . . "); *United States v. Twin City Power Co.*, 350 U.S. 222, 250-251, 76 S. Ct. 259, 100 L. Ed. 240 (1956) (holding that "[j]ust compensation includes all elements of value that inhere in the property. . . . ").

Common sense dictates that a potential purchaser will pay less for a contaminated property than for a similar property that is free of contamination. No reasonable buyer would pay full price for a contaminated site, and accept the potential liability arising from the site, if a clean site is available at the same cost. Therefore, evidence of contamination clearly affects the market value of condemned property, and must be considered in determining the just compensation for a condemned piece of property.

In the present case, both parties acknowledged that the environmental condition of the property had an impact on its fair market value. In fact, both Petitioner and Respondents introduced expert testimony regarding the impact of environmental contamination on a potential purchaser in the marketplace. On that basis, the Circuit Court found that the environmental condition of the property impacted its value. Thereafter, the Michigan Supreme Court ruled that contamination was relevant to the fair market value of the property in question and found that the Circuit Court properly considered contamination as one factor in determining just compensation. *See*, Opinion, App. 12-14. This is entirely consistent with the precedent of this Court, as established by *Searl v. Lake Co. School Dist. No. 2*, 133 U.S. 553, 564, 10 S. Ct. 374, 33

L. Ed. 740 (1890), *Seaboard A.L.R. Co. v. United States*, 261 U.S. 299, 306, 43 S. Ct. 354, 67 L. Ed. 664 (1923) and *United States v. Twin City Power Co.*, 350 U.S. 222, 250-251, 76 S. Ct. 259, 100 L. Ed. 240 (1956).

Despite the foregoing authority, Extrusions argues that the Michigan Supreme Court's decision is in direct conflict with this Court's precedent, citing a number of cases in support of the proposition that courts may depart from a strict adherence to fair market value criteria in determining just compensation. *United States v. Miller*, 317 U.S. 369, 63 S. Ct. 276, 87 L. Ed. 336 (1943); *United States v. General Motors Corp.*, 323 U.S. 373, 65 S. Ct. 357, 89 L. Ed. 311 (1945); *United States v. Commodities Trading Corp.*, 339 U.S. 121 (1950); *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 93 S. Ct. 791, 35 L. Ed. 2d 1 (1973); *United States v. 564.54 Acres of Land*, 441 U.S. 506, 99 S. Ct. 1854, 60 L. Ed. 2d 435 (1979) and *United States v. Cors*, 337 U.S. 325, 69 S. Ct. 1086, 93 L. Ed. 2d 1392 (1999). Petitioner claims that "market value" is simply a "Working Rule" for just compensation analysis. Petition for a Writ of Certiorari, at pp. 22-26. Each of these decisions, however, involved unique circumstances where no determination of fair market value was feasible or appropriate.

In *Commodities Trading Corp.*, Commodities brought suit against the U.S. government seeking to recover just compensation for 760,000 pounds of pepper that had been requisitioned by the War Department during World War II. This Court found that no fair market value could be determined at that time because the price of pepper was governed by the Emergency Price Control Act. On that basis, this Court departed from the fair market value,

using the ceiling prices set under the Emergency Price Control Act to set just compensation.

Similarly, in *United States v. Cors*, 337 U.S. 325 (1949), the owner of a tugboat sought just compensation for one of many tugboats that was requisitioned by the government during World War II. The owner argued that just compensation should be based on the increased demand for tugboats created by the government. The Court stated that it was not fair that the government be required to pay the enhanced price which its demand alone had created. That enhancement reflected elements of value that was created by the urgency of its need for the property. It did not reflect what a willing buyer would pay in cash to a willing seller in a fair market. It represented what could be exacted from the government whose demands in the emergency created a sellers' market.

In *Miller*, the owner of condemned property sought to recover just compensation for property based on increased market value that was due to the government's authorization of the railroad project for which the property was ultimately condemned. In that case, the United States Supreme Court held that a property owner was not entitled to just compensation from the government for market value increases that were attributable to the government's authorization of a project in the vicinity of the condemned property.

In *Almota Farmers Elevator*,[1] a property owner sought to recover the value of improvements at a condemned

[1] Extrusions also quotes *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 483 (1973), in support of the

(Continued on following page)

property based on the value of those improvements over their useful life. The Court held that just compensation for improvements requires a consideration of value of continued use of improvements, because that is how the market would have valued such improvements. Therefore, if anything, this case demonstrates the Court's reluctance to depart from the use of fair market value in determining just compensation.

In *United States v. General Motors Corp.*, General Motors sought to recover just compensation for condemnation of a leasehold interest in a plant. There, the Court ruled that, although compensation was normally limited to fair market value in cases where property was taken in fee simple, and although the taking here was temporary, its effect was to destroy the tenant's leasehold. Thus, General Motors was entitled to compensation for such consequential costs as moving out of the property and preparing the space for occupancy by the government. This case focuses on the aspect of a temporary taking that is, in essence, a total taking of the tenant's interest in the property, and how to compensate for those incidentals.

Finally, in *564.54 Acres of Land*, the owner of nonprofit summer camps argued that just compensation required payment of replacement costs rather than the fair market value of the property because there was not an active market for summer camp properties. This Court

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proposition that fair market value is not a "universal formula" for determining just compensation; however, Extrusions fails to note that the quoted phrase is actually from the dissenting opinion in that case. Consistent with the general rule, the majority held that just compensation is determined by "fair market value." *Id.* at 474.

noted that departure from the use of the fair market value principle is allowable only in instances in which market value is too difficult to ascertain, such as the condemnation of public roads or sewers. In that case, however, this Court found that a fair market value could be determined for summer camps that had been condemned, despite the fact that there was an extremely inactive market for such properties.

Thus, even under the cases cited by Extrusions, this Court has allowed a departure from a strict adherence to fair market value criteria in determining just compensation only in light of unique circumstances where no determination of fair market value was feasible or appropriate. That is clearly not the situation here. As previously noted, both parties offered expert testimony on the determination of fair market value. Furthermore, none of the cases cited above suggest that it is in any way "unconstitutional" for a trial court to determine just compensation where the fair market value is readily ascertainable, as here. Thus, it is the theory advanced by Extrusions, and not the decision of the Michigan Supreme Court, that is in direct conflict with the precedent of this Court.

III. PETITIONER HAS NOT SHOWN A COMPELLING REASON FOR REVIEW AS THE ISSUES RAISED ARE STATE SPECIFIC, AND A "CONFLICT" BETWEEN SUPREME COURTS ON THIS ISSUE HAS NOT, IN FACT, ARISEN AS A RESULT OF THE ANALYSIS OF THE MICHIGAN SUPREME COURT IN THIS MATTER.

A. Under Michigan Law, The Exclusion Of Evidence Of Environmental Contamination In Condemnation Proceedings Would Result In The Unjust Enrichment Of Property Owners, And Would Create A Disincentive To Brownfield Redevelopment.

It is a well-established and long-standing principle of Michigan condemnation law that "the public must not be enriched at the property owner's expense, but neither should the property owner be enriched at the public expense." *Department of Transportation v. Van Elslander*, 460 Mich. 127, 129, 594 N.W.2d 841; *see also*, *State Hwy. Commissioner v. Eilender*, 362 Mich. 697 699, 108 N.W.2d 755. This principle is consistent with the Supreme Court's holding that "a private party 'is entitled to be put **in as good a position** pecuniarily as if his property had not been taken. **He must be made whole but is not entitled to more.**'" *See Brown v. Legal Found.*, 538 U.S. 216, 123 S. Ct. 1406, 1419, 155 L. Ed. 2d 376 (2003) quoting *Olson v. United States*, 292 U.S. 246, 255, 78 L. Ed. 1236, 54 S. Ct. 704 (1934) (emphasis added). To prevent the unjust enrichment of the property owner in condemnation proceedings, the Courts have allowed the condemning authority to present any relevant evidence that tends to affect the market price of the property, thereby allowing the condemning authority to show any defects, damages or other factors which would result in a reduced market price.

Petitioner argues that evidence of contamination must be excluded during condemnation proceedings to protect a property owner's right to just compensation. In support of this argument, Petitioner cites *Alladin, Inc. v. Black Hawk County, Iowa*, 562 N.W.2d 608 (Iowa 1997), in which the Supreme Court of Iowa found that evidence of cleanup costs were inadmissible during condemnation proceedings because admission of such evidence would not allow the owner of contaminated property to raise defenses in the condemnation proceedings that would be available in a cost recovery action. This ruling apparently fails to recognize the distinction between condemnation proceedings and cost recovery actions. While cost-recovery actions are concerned with fault, the purpose of condemnation proceedings is to determine the amount of just compensation due to the owner of condemned property. As noted in § II., above, just compensation is determined by the market value of the property. Because any defenses that a property owner might have in a cost recovery action do not affect the market value of the property, any such defenses have no bearing on just compensation, and therefore do not provide a basis for the exclusion of evidence of contamination in condemnation proceedings.

Furthermore, the exclusion of evidence of contamination is inconsistent with this Court's ruling in *Brown v. Legal Found.*, *supra*, that a property owner is not entitled to more than just compensation. If contaminated property is valued as though it were clean during the valuation trial the property owner clearly receives a judgment in excess of just compensation. The property owner is unjustly enriched in an amount equal to the difference between the value of the contaminated property and the

value of it as clean. Extrusions previously argued that this apparent injustice can be remedied if the condemning authority is made whole in a subsequent cost recovery action. The right to bring a cost recovery action, however, does not balance the unjust enrichment to a property owner. Moreover, this additional step does not ensure that the actual payments ultimately received by the property owner equal fair market just compensation. On the contrary, at the close of condemnation proceedings the property owner receives compensation in excess of the fair market value.

While it is possible that the condemning authority may recover the excess amount through a subsequent cost recovery action, it may ultimately be left "holding the bag" for environmental damages in the event that the current property owner did not cause the contamination. If the property owner did not cause the contamination, the condemning authority would have no basis under current Michigan law for recovery of response costs in a subsequent cost recovery action against the property owner.[2] Thus, if evidence of contamination is excluded during condemnation proceedings, the property owner would receive a windfall because contaminated property could be purchased at a reduced rate while the condemning authority would be required to compensate the property owner for the taking of clean property.

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[2] Pursuant to Part 201 of the Natural Resources and Environmental Protection Act (NREPA) at MCL 324.20101 *et seq.*, a purchaser of contaminated property may file a baseline environmental assessment (BEA) within 45 days of the date of purchase documenting the levels of contamination present, thereby relieving that purchaser of liability for that contamination.

Based on the foregoing, the Michigan Supreme Court appropriately held that just compensation must be determined during condemnation proceedings since, under Michigan law, there is no guarantee that subsequent actions will adequately ensure that fair market value has been awarded. To hold otherwise not only unjustly enriches owners of contaminated property, but also penalizes a condemning authority, creating a serious disincentive to brownfield redevelopment in direct contravention of established public policy.

B. Michigan's Uniform Condemnation Procedures Act Does Not Allow For Double Recovery Of Environmental Response Costs.

Petitioner argues that the admission of evidence of contamination during condemnation proceedings deprives a property owner of just compensation because such a procedure would allow a condemning authority to obtain double recovery against the owner for environmental response costs. *See*, Petition for a Writ of Certiorari, at 17, *citing*, *Hous. Auth. v. Suydam Investors, L.L.C.*, 826 A.2d 673, 686 (New Jersey 2003). Petitioner argues that a condemning authority could obtain contaminated property at reduced value and "later sue[ ] the owner in a cost-recovery action" to recover related environmental response costs. *Id.*

Despite the fact that Michigan condemnation law does not violate the constitutional principle of just compensation, (*see*, § II., above) Petitioner seeks certiorari on the grounds that two other state supreme courts have reached a different conclusion with respect to the admissibility of evidence of contamination, *citing, Alladin, Inc. v. Black Hawk County, Iowa*, 562 N.W.2d 608 (Iowa 1997) and *Hous. Auth. v. Suydam Investors, L.L.C.*, 826 A.2d 673

(New Jersey 2003). In essence, Petitioner asks this Court to review Michigan's condemnation procedures from the U.C.P.A. in light of opinions interpreting condemnation procedures in place in New Jersey and Iowa. Yet, because each of these states has its own unique condemnation procedure, whether evidence of contamination is admissible in New Jersey or Iowa is irrelevant here.

A simple review of the specific procedure allowed by the Michigan U.C.P.A. establishes the protections in the statute to prevent double recovery. Section 5 of the Uniform Condemnation Procedures Act (U.C.P.A.) states as follows:

> The good faith offer shall state whether the agency **reserves or waives** its rights to bring federal or state cost recovery actions against the present owner of the property arising out of a release of hazardous substances at the property and the agency's appraisal of just compensation for the property shall reflect such reservation or waiver.

MCLA 213.55(1); (Emphasis added) ("§ 5 of the U.C.P.A." throughout).

It is undisputed that § 5 of the U.C.P.A. requires the condemning authority to either reserve or waive its right to bring a subsequent cost recovery action. The very inclusion of this requirement suggests that the waiver or reservation of rights would have some effect on the condemnation proceeding itself. The clear intent of § 5 of the U.C.P.A., when read as a whole, is to prevent a condemning authority from pursuing double recovery for environmental damages through both condemnation proceedings and subsequent cost recovery actions. Therefore, it stands

to reason that where a condemning authority has reserved its right to bring a subsequent cost recovery action, it is precluded from seeking double recovery by introducing evidence of contamination in condemnation proceedings under § 5 of the U.C.P.A. However, where a condemning authority has waived its right to bring a subsequent cost recovery action, it is allowed to introduce evidence of contamination to the extent that the contamination affects the fair market value of the property. This interpretation in no way conflicts with the plain language of § 5 of the U.C.P.A., and gives meaning to the waiver provision contained therein. To hold otherwise deprives the requirement of any real effect. The condemning authority would have no incentive to ever waive its right to bring a subsequent cost recovery action since such a waiver would amount to a complete release of any right to protect itself from environmental damages.

In summary, the U.C.P.A. requires a condemning authority to **either** reserve its right to bring a cost recovery action, in which case the condemning authority may not introduce evidence of environmental contamination during condemnation proceedings, **or**, alternatively, waive its right to bring a cost recovery action, which entitles the condemning authority to introduce evidence of contamination in determining fair market value. *See* MCLA 213.55(1). As a result, there is no potential for double recovery by the condemning authority.[3] Thus, the U.C.P.A.

[3] Petitioner argues that there is a potential for double recovery in a cost recovery action, *citing*, *Detroit v. A.W. Miller, Inc.*, 842 F. Supp. 957 (E.D. Mich. 1994); however, Petitioner fails to note that the condemnation proceedings at issue in that case were initiated in 1987, long before

(Continued on following page)

protects property owners' right to just compensation while preventing the unjust enrichment of property owners at the expense of the public.

In spite of this, Petitioner argues that potential double recovery against the owner by the condemning authority violates a property owners right to just compensation, *citing, Hous. Auth. v. Suydam Investors, L.L.C.*, 826 A.2d 673 (New Jersey 2003). In *Suydam*, the Supreme Court of New Jersey held that "[w]hen property is devalued for contamination in condemnation, landowners first receive discounted compensation in the condemnation proceeding and then are subject to the full cleanup costs, thus suffering what is colloquially denominated as a 'double-take.'" *Id.* at 686. However, the New Jersey condemnation procedures at issue were dramatically different than those set forth in the Michigan U.C.P.A. In reviewing the New Jersey condemnation procedures, the *Suydam* court described the condemnation process as follows:

> In different decisions, our Appellate Division has sanctioned both approaches for valuing contaminated property in condemnation. In *New Jersey Transit Corp. v. Cat in the Hat*, 353 N.J. Super. 364, 376-78, 803 A.2d 114 (2002), aff'd, 177 N.J. 29, 826, A.2d 690, 2003 N.J. LEXIS 689, N.J. (2003), the Appellate Division approved the following procedure: the condemnor appraises the property as if remediated; deposits that amount in a trust fund in court and reserves the right to bring a separate action to recover remediation

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the 1993 U.C.P.A. Amendments were enacted. As a result, the *Detroit* decision has no bearing on the present case.

> costs. The second method was approved in this case: the condemnor considers environmental contamination in calculating the fair market value of the property, reduces the property value accordingly, deposits that money in court and reserves the right to file a separate action to recover any remediation costs. *Housing Auth., supra*, 355 N.J. Super. at 540. It falls to us to choose the best of those methods.

Id. at 685.

As set forth above, New Jersey condemnation procedures clearly did not track § 5 of the U.C.P.A., which require a condemning authority to **either** reserve its right to bring a cost recovery action **or** waive its right to bring a cost recovery action, entitling it to introduce evidence of contamination in determining fair market value. On the contrary, the New Jersey condemnation procedures that were found to be in violation of the constitutional principle of just compensation allowed the condemning authority to **both** "consider environmental contamination in calculating the fair market value of the property" **and** "reserve the right to file a separate action to recover any remediation costs." *Id.* Thus, unlike the U.C.P.A., the condemnation procedures at issue in *Suydam* did not preclude double recovery of environmental response costs.

IV. PETITIONER HAS NOT SHOWN A COMPELLING REASON FOR REVIEW AS PETITIONER'S ARGUMENT ATTEMPTS TO CONVERT A CONDEMNATION PROCEEDING FROM AN *IN REM* PROCEEDING TO AN *IN PERSONAM* PROCEEDING.

The United States Supreme Court has long recognized that condemnation proceedings are *in rem* proceedings.

A.W. Ducket & Co., Inc. v. United States, 266 U.S. 149, 45 S. Ct. 38, 69 L. Ed. 216 (1924); *United States v. Petty Motor Co.*, 327 U.S. 372, 66 S. Ct. 596, 90 L. Ed. 729 (1946); *United States v. Carmack*, 329 U.S. 230, 67 S. Ct. 252, 91 L. Ed. 209 (1946).

In rem proceedings are against the property, and the concept of individual liability is foreign to the process. *Id.* *In rem* proceedings in condemnation matters are instituted to determine the value of the property and to transfer ownership of the property to a state agency. The parties are the state and the current owner of the land. The identity of who devalued the property is, in fact, irrelevant to this *in rem* proceeding.

An action to recover environmental remediation costs is an *in personam* proceeding, instituted to assign liability and to allocate responsibility among the defendants for clean-up costs. These proceedings are brought pursuant to the relevant environmental statutes, being either part 201 of the Michigan National Resources and Environmental Protection Act, MCL §§ 324-20202, *et seq.* or the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. §§ 9601, *et seq.* (CERCLA). The value of the property is not at issue in NREPA or CERCLA matters and the U.C.P.A. does not govern those proceedings.

The issue, as conceded by Petitioner in its Petition for a Writ of Certiorari, at pp. 16-19, in a cost recovery action, is identifying the specific individual or entity that is responsible for devaluation of the property. Additionally, the damages may far exceed the value of the property. This is, in the classic sense, an *in personam* proceeding. In a condemnation proceeding, however, the issue is not to

assign liability to individuals or entities, but to simply value the property.

Petitioner's analysis, therefore, is an attempt to reverse the long standing precedent of this Court, and to argue that proceedings of condemnation actions be converted to *in personam* proceedings. Petitioners argue, therefore, that condemnation proceedings should not look at the value of the property, irrespective of personal liability, but to personal liability in valuing the property in an *in rem* proceeding. This runs contrary to the long standing precedent of this Court.

CONCLUSION AND RELIEF

For all the foregoing reasons, Respondent requests that the Petition be denied.

Respectfully submitted,

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(3)

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In The

Supreme Court of the United States

EXTRUSIONS DIVISION, INC.,

Petitioner,

v.

SILVER CREEK DRAIN DISTRICT,

Respondent.

On Petition For A Writ Of Certiorari To The Michigan Supreme Court

REPLY BRIEF OF PETITIONER

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14 pp

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The only parties to this proceeding are Petitioner and Respondent. Pursuant to Supreme Court Rule 29.6, Petitioner states that it has no parent corporation and that no publicly held company owns 10% or more of Petitioner's stock.

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REPLY BRIEF OF PETITIONER

Extrusions' petition for certiorari presents a clear, substantial, and mature conflict between and among the Supreme Courts of Connecticut, Iowa, Michigan and New Jersey on an important question of federal law: how the concept of "just compensation" under the U.S. Constitution applies to condemned property that is environmentally contaminated (a "brownfield").

The Michigan Supreme Court, joining the Connecticut Supreme Court, held that the fact of contamination *must be* considered in determining just compensation because it is a factor relevant to market value. In contrast, the New Jersey and Iowa Supreme Courts have held that evidence of contamination *must not be* considered in determining just compensation because its effect on market value is uncertain, and because it deprives the owner of the due process protections the owner would have in an environmental cost-recovery action. Thus, those courts have held that environmental contamination can only be considered in a separate environmental cost-recovery action. This Court's intervention is the only way to resolve the conflict among the state Supreme Courts and restore uniformity to national takings jurisprudence.

The Michigan Supreme Court's decision is also demonstrably wrong. This Court has consistently held that the *sine qua non* of the just compensation analysis is to put the property owner in the position the owner would have been but for the taking. Market value is merely one means to measure just compensation and must be disregarded where, as in the case of contaminated property, it cannot be adequately determined or leads to a result which does not leave the property owner in the same position the owner was in before the taking. The Michigan Supreme Court's decision below ignored this Court's precedent, and this is a second and independent ground for granting the writ.

In an attempt to draw this Court's attention away from the state Supreme Court split and this Court's

previous decisions on the federal constitutional question, Respondent argues that the Michigan Supreme Court's decision merely interprets a state statutory scheme, which should be of no interest to this Court. There is no basis for this characterization. The Michigan Supreme Court did not analyze the language of Michigan's takings statute to determine whether the legislature intended to exclude issues of environmental contamination from just compensation trials. Indeed, it criticized the Michigan Court of Appeals for having engaged in such an analysis of the statutory language (App. 12a). Instead, the Michigan Supreme Court took a constitutional shortcut, holding that the statute could not mean that evidence of contamination be excluded from the just compensation determination because this would make the statute unconstitutional. This holding was based on the premise that "just compensation" under the U.S. Constitution means market value, and therefore any factor relevant to market value must be considered. This premise was not based on any analysis of the statutory language, but solely on the Michigan Supreme Court's reading of judicial decisions interpreting the United States and Michigan Constitutions (App. 7a-12a).

In sum, the constitutional issue is cleanly presented by the decision below; is of fundamental significance to the widespread urban brownfield redevelopment taking place across the country; and is in need of this Court's immediate resolution.

I. This Case Presents a Ripe and Mature Constitutional Conflict Among State Supreme Courts Regarding the Meaning of "Just Compensation" in the Context of Environmentally Contaminated Property.

As Petitioner has explained, the Supreme Courts of four states are divided over the Constitution's just compensation requirements in an environmental contamination context. Both the Iowa Supreme Court and the New Jersey Supreme Court have held that the Constitution

requires exclusion of contamination evidence, because its inclusion does not allow an innocent landowner to raise the liability defenses it has under environmental laws, and because it presents intractable appraisal problems. *Housing Auth. of the City of New Brunswick v. Suydam Investors, LLC*, 826 A.2d 673 (N.J. 2003); *Alladin, Inc. v. Black Hawk County, Iowa*, 562 N.W.2d 608 (Iowa 1997). *See also* Pet. 16-18. These courts have held that the issue of contamination must be resolved in a separate environmental cost-recovery action. In direct conflict, the Michigan Supreme Court has now joined the Connecticut Supreme Court in holding that admission of contamination evidence is the only method that is constitutional, because just compensation requires consideration of all elements that affect market value. *Northeast Conn. Econ. Alliance v. ATC P'ship*, 776 A.2d 1068 (Conn. 2001). *See also* Pet. 18-19.

Respondent does not deny this mature and divisive conflict among state Supreme Courts, which warrants resolution. S. Ct. Rule 10(b); Pet. 15-21. Instead, Respondent argues that the Michigan Supreme Court was engaged in nothing more than statutory interpretation of a state statute. But in holding that the just compensation determination must include consideration of environmental contamination, the Michigan Supreme Court did not undertake a "delicate and intricate" interpretation of Michigan's Uniform Condemnation Procedure Act as Respondent alleges. (Opp. 3.) Rather, it examined both its own decisions and the late 19th and early 20th century decisions of this Court, and then concluded that the federal and state constitutions require every element affecting a property's market value to be considered in a just compensation calculation. (App. 10a-11a.) As even Respondent concedes, "The Michigan Supreme Court [] determined the meaning of 'just compensation' . . . , reviewing both state and federal constitutional law." (Opp. 6.) The Michigan Supreme Court then concluded it could not "place the legislators in the posture of acting unconstitutionally" (App. 12a), and held that as a matter

of constitutional law, all factors affecting market value must be included in a just compensation analysis.

In fact, it is the Michigan Court of Appeals, not the Michigan Supreme Court, that engaged in the statutory analysis Respondent alleges, and the Court of Appeals held for Petitioner and the exclusion of the evidence of contamination. (Pet. 11-13.) And, it was this analysis that the Michigan Supreme Court specifically rejected, stating that the "Court of Appeals error was to utilize the plain-language doctrine in a context where it was inapplicable." (App. 12a.) Even the concurring and dissenting opinions in the Michigan Supreme Court acknowledged that the majority's decision was based on constitutional analysis. (*See* App. 15a, Cavanagh, J., concurring ("I would not reach the constitutional issue."); *id.*, Weaver, J., concurring in part and dissenting in part ("I write separately to express my disagreement with the majority's construction of the constitutional concept, 'just compensation.' ").)

The Michigan Supreme Court's decision is based solely on constitutional, not legislative, analysis, thus placing it among the deeply divided state Supreme Courts. The propriety of granting the writ in this case cannot be disputed.

II. The Michigan Supreme Court's Ruling is Inconsistent with this Court's Precedents.

The touchstone of just compensation is the full indemnification of the owner. *U.S. v. 564.54 Acres of Land*, 441 U.S. 506, 510-511, 99 S. Ct. 1854, 1857, 60 L. Ed. 2d 435 (1979). Market value is merely the "working rule." *Id.* Just last term, this Court reaffirmed the indemnity principle embodied in the Fifth Amendment's guarantee of just compensation: a private party "is entitled to be put in as good a position pecuniarily as if his property had not been taken." *Brown v. Legal Found. of Washington*, 538 U.S. 216, ___, 123 S. Ct. 1406, 1419, 155 L. Ed. 2d 376 (2003) (citation omitted). Thus, "*while the indemnity*

principle must yield to some extent before the need for a practical general rule, this Court has refused to designate market value as the sole measure of just compensation. For there are situations where this standard is inappropriate." *U.S. v. 564.54 Acres of Land*, 441 U.S. at 512, 99 S. Ct. at 1858 (emphasis added). *Accord U.S. v. Commodities Trading Corporation*, 339 U.S. 121, 123, 70 S. Ct. 547, 549, 94 L. Ed. 707 (1950) ("This Court has never attempted to prescribe a rigid rule for determining what is 'just compensation' under all circumstances and in all cases."); *U.S. v. General Motors Corporation*, 323 U.S. 373, 379, 65 S. Ct. 357, 360, 89 L. Ed. 311 (1945) ("In some cases this criterion [of market value] cannot be used either because the interest condemned has no market value or because, in the circumstances, market value furnishes an inappropriate measure of actual value.").

Environmentally contaminated property is one situation where the market value "working rule" is inappropriate. First and foremost, the market value approach violates the indemnity principle. It leaves the innocent property owner of environmentally contaminated property in a worse position than he would have been but for the taking. Here, for example, Petitioner purchased the contaminated subject property (an old high school football field) in 1982 for $106,000. (Pet. 7.) Petitioner did nothing with the vacant and unimproved field over the following 12 years except place a chain link fence around its perimeter. *Id.* By 1993, the year before the take, the local tax assessor valued the field, *as contaminated*, at $264,600 (Pet. 8), an increase of more than 150% over the purchase price. Yet, despite Respondent's acknowledgement that Petitioner was and is not responsible for any of the contamination existing on the field (Pet. 7), the trial court calculated "just compensation" at only $41,032. (Pet. 10.) In other words, the Michigan Supreme Court has endorsed a just compensation result that is less than 40% of the field's purchase price 12 years earlier, and only 15.5% of the field's 1993 assessed tax value, as contaminated. By any measure, that result does not leave Petitioner in the

same position it would have been in but for the taking.[1] Logic dictates that something is wrong in the Michigan Supreme Court's "all things considered" method of calculating just compensation. The "working rule" of "market value" is inappropriate where "an award of market value would diverge so substantially from the indemnity principle as to violate the Fifth Amendment." *U.S. v. 564.54 Acres of Land*, 441 U.S. at 513, 99 S.Ct. at 1858.

Second, market value of contaminated property is nearly impossible to determine, and it is appropriate to depart from the fair market value method where it is "impracticable" to determine market value. *Id.*; *accord* Opp. 11-12. As the Michigan Court of Appeals noted below: "Contaminated properties are like snow flakes; no two are alike. Thus, it is virtually impossible to find a comparable parcel of property on which to base an estimation of value." (App. 33a; *accord* 7A *Nichols on Eminent Domain* § 13B.04(1)(a) (2003) ("conditions and circumstances of each case are unique," so "[e]stimates of the value of contaminated property are necessarily speculative").)

The peculiar quality of each piece of contaminated property is why Respondent's expert appraiser acknowledged at trial that he was unqualified and unable to appraise the property "as contaminated."[2] (Pet. 9.) So, the

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[1] This is particularly true given that, one year after the take, the Michigan Legislature established separate cleanup standards for "industrial" properties under which the arsenic in the field's topsoil would have been acceptable for an industrial or manufacturing purpose, the field's highest and best use. (Pet. 9.) So, but for Respondent's condemnation, Petitioner would have had the full use value of its property *without ever paying a dime for environmental cleanup*.

[2] Respondent claims that "both parties offered expert testimony on the determination of fair market value" (Opp. 12), but in fact, both parties only offered expert testimony of the property's fair market value *as clean*. Neither was able to procure expert testimony of the property's fair market value as contaminated. (Pet. 9-10.)

trial court "solved" the problem by averaging the expert appraisals of the property as clean, and then deducting the average expert estimate of a hypothetical cleanup that never actually took place (Pet. 9-10), thus reaching its $41,032 just compensation figure. But the Appraisal Standard Board has issued an advisory opinion warning appraisers that it is inappropriate to simply deduct estimated cleanup costs from a property's market value. Appraisal Standards Board, *Uniform Standards of Professional Practice*, AO-09 (The Appraisal Foundation, 2003). Based on the disparity in the trial court's just compensation calculation ($41,032) versus the condemned property's tax assessed value as contaminated ($264,600), it is easy to see why the Board would issue such a warning. Thus, in appraising contaminated property appraisers are charged with the virtually impossible task of finding identical "snow flakes." The market value approach, in this context, is certainly "impracticable," if not impossible.

Respondent does not dispute that this Court has previously made exceptions to the "all things considered" market value approach, but instead argues that each of this Court's prior cases was "unique" and did not involve environmental contamination. (Opp. 9-12.) Respondent ignores the fact that two state Supreme Courts have considered contaminated property unique enough to abandon the "all things considered" formula in favor of an exclusion approach that better guarantees full indemnity. Respondent also ignores the fact that the two state Supreme Courts that held in favor of inclusion overturned unanimous lower court decisions favoring exclusion in doing so. (Pet. 13-14, 18-19.) Respondent further ignores that the boom in "brownfield" redevelopment and the reliance on condemnation as a means of securing ownership (Pet. 19-21.) is of recent origin and this Court has never before had the opportunity to opine on the just compensation analysis in an environmental contamination context. These are good reasons to grant the writ and resolve the vexing question that has divided the state Supreme Courts.

III. Condemnation of Environmentally Contaminated Property Improperly Combines Elements of *In Rem* and *In Personam* Proceedings, Unconstitutionally Depriving Owners of Just Compensation and Due Process.

Respondent claims that to separate the *in personam* and *in rem* proceedings would result in a windfall to property owners, who would then receive full market value for contaminated property as if the property was uncontaminated. (Opp. 13-16, 20-22.) To begin, this is a merits argument that goes to the heart of the divisions between the state Supreme Courts, which only serves to highlight the need for this Court's immediate review and resolution of the issue.

More substantively, Respondent's argument exists not in the real world, but in a theoretical one. In some cases, the condemning agency will recover remediation costs from the owner if the owner is responsible for the contamination. Michigan's exclusion statute allows the condemning agency to place such funds in escrow until after the just compensation and cost-recovery actions have been completed. (Pet. 5-7.) In others, the condemning agency will be successful in recovering remediation costs from responsible third parties. After all, in addition to "purchasing" the real property, Respondent has condemned the "stick" in Petitioner's bundle that gave Petitioner the right to pursue responsible parties. (Pet. 27.) In still others, the condemning agency will be able to take advantage of tax benefits and government subsidies to reimburse it for any necessary remediation (Pet. 20), as Respondent apparently did in this case. And in the rare situation where the owner is innocent, responsible third parties are not collectible, and there are no tax or other subsidies, that is the risk the condemning agency took when it decided to condemn the property. Property owners

do not get to choose when their property will be condemned; they are otherwise innocent parties who happen to be in the way of a public improvement project.[3]

In addition, the Michigan Supreme Court's approach resulted in a $41,032 just compensation award for property the local tax assessor valued at $264,600 as contaminated. In essence, Petitioner has been "dunned" for contamination it did not cause and would never have had to clean up. As the Michigan Court of Appeals below noted, "the inequity of deducting such costs before any determination of the landowner's liability is clear." (App. 31a.) Such an absurd result is possible in every case involving contaminated property because the landowner cannot raise in the *in rem* just compensation trial the *in personam* defense that he is not responsible for the contamination. (Pet. 6, 16-18, 26-28). The leading eminent domain treatise recognizes this problem: "Admitting evidence of contamination in the eminent domain trial to determine just compensation for property taken may blur the sharp divide between [*in rem* and *in personam*] actions and create inconsistencies." 7A *Nichols on Eminent Domain* § 13B.03(2)(a) (2003).

Respondent completely ignores these points, but it was for these and other reasons that the Supreme Courts of Iowa and New Jersey held that allowing admission of contamination evidence in a just compensation trial

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[3] As for Respondent's statutory argument regarding double recovery (Opp. 16-20), the argument is not pertinent to the certiorari decision; was rejected by the Michigan Court of Appeals (Pet. 11-13); went unaddressed in the Michigan Supreme Court (Pet. 13-14); is irrelevant given the Michigan Supreme Court's broad constitutional holding that evidence of contamination must always be included regardless of whether the condemning agency reserved or waived its right under Michigan law to bring a cost recovery action; and does not account for the condemning agency's acquisition of the right to sue third parties or to recover reimbursement from other governmental entities, as described above.

violates both due process and just compensation principles. (Pet. 16-18.) This constitutional issue is of obvious and immediate importance and warrants this Court's resolution.

CONCLUSION

The state Supreme Court split threatens national uniformity in takings jurisprudence, and the Michigan Supreme Court's decision undermines the owner's constitutional right to just compensation and due process. This Court should grant the petition for writ of certiorari.

Respectfully submitted,

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